Supreme Court, U.S.
FILED
DEC 17 2002
OFFICE OF THE CLERK

No. 02 956

In The

Supreme Court of the United States

DEC 27 2002

A. T. MASSEY COAL COMPANY, INC., *et al.*,

Petitioners,

v.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John R. Woodrum
Counsel of Record
Margaret S. Lopez
HEENAN, ALTHEN
& ROLES, LLP
1110 Vermont Ave., N.W.
Suite 400
Washington, D.C. 20005
(202) 887-0800

Counsel for Petitioners

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, Virginia 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

112 pp

QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit erroneously deny Petitioners the benefit of this Court's precedent in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (plurality), by relying on statutory distinctions rather than a material factual difference, in holding that Petitioners were not in a position substantially identical to the operator in *Eastern*, whose beneficiary assignments under the Coal Industry Retiree Health Benefit Act of 1992 were held to be unconstitutional by a majority of the Justices because Eastern did not sign a coal wage agreement which promised lifetime health benefits.

LIST OF PARTIES

Petitioners A.T. Massey Coal Company, Inc.; Massey Coal Services, Incorporated; Peerless Eagle Coal Company and Tennessee Consolidated Coal Company were plaintiffs in the proceedings below. Respondents Larry G. Massanari in his capacity as Acting Commissioner of Social Security; Michael H. Holland, William P. Hobgood, Marty D. Hudson, Thomas O.S. Rand, Elliott A. Segal, Carl E. Van Horn, and Gail R. Wilensky, Trustees of the United Mine Workers of America Combined Benefit Fund and the United Mine Workers of America Combined Benefit Fund were defendants in the proceedings below. Jo Anne B. Barnhart is currently the Commissioner of Social Security.

The counterclaim defendants to the action below were the above-named Petitioners and Rawl Sales and Processing, Co.; Omar Mining Co.; PM Charles Coal Co.; Rocky Hollow Coal Company; Sprouse Creek Processing Co.; Trace Fork Coal Co.; Big Bear Mining Co.; Dehue Coal Co.; Douglas Pocahontas Coal Corp.; Goals Coal Co.; Green Valley Coal Co.; Hopkins Creek Coal Co.; Joboner Coal Co.; Lick Branch Coal Co.; Eagle Energy, Inc.; Power Mountain Coal Co.; Majestic Mining, Inc.; Performance Coal Co.; Vantage Mining Co.; Russell Fork Coal Co.; Vesta Mining Co. and Williams Mountain Coal Co.

CORPORATE DISCLOSURE STATEMENT

Massey Coal Services, Incorporated is a subsidiary of Massey Coal Sales Company, Inc. which is a subsidiary of A.T. Massey Coal Company, Inc.

Peerless Eagle Coal Company is a subsidiary of Sidney Coal Company, Inc. which is a subsidiary of A.T. Massey Coal Company, Inc.

Tennessee Consolidated Coal Company is a subsidiary of Martin County Coal Corporation which is a subsidiary of A.T. Massey Coal Company, Inc.

A.T. Massey Coal Company, Inc. is a subsidiary of Massey Energy Company, which is a publicly held company.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. THE COAL INDUSTRY RETIREE HEALTH BENEFIT ACT OF 1992 4

B. THE *EASTERN ENTERPRISES* DECISION 6

1. The Facts of the *Eastern* Case 7

2. The *Eastern* Decision 7

C. FACTS RELATING TO ASSIGNMENTS MADE TO PETITIONERS 9

D. THE COMMISSIONER'S RESPONSE TO *EASTERN ENTERPRISES* 10

E. THE DECISION BELOW 11

REASONS FOR GRANTING THE WRIT 13

A. THERE IS A NEED FOR INSTRUCTION ON APPLICATION OF THE "SUBSTANTIALLY IDENTICAL" TEST THAT THE LOWER COURTS HAVE DEVISED TO DETERMINE WHEN TO APPLY THE RESULT OF PLURALITY DECISIONS IN WHICH THERE IS NO CLEAR RULE OF LAW WHICH COMMANDED A MAJORITY 13

B. THE FOURTH CIRCUIT ERRED IN RELYING ON A STATUTORY CONSTRUCT TO FIND THAT PETITIONERS ARE NOT SUBSTANTIALLY IDENTICAL TO EASTERN 16

1. Petitioners are substantially identical to Eastern Enterprises 17

2. It is irrelevant to the constitutional question that Petitioners are related to companies that signed the 1974 coal wage agreement 20

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases:

Association of Bituminous Contractors, Inc. v. Apfel,
156 F.3d 1246 (D.C. Cir. 1998).....14

Barnhart v. Sigmon Coal Co.,
534 U.S. 438, 122 S. Ct. 941 (2002) 4

Berwind Corp. v. Commissioner of Soc. Sec.,
307 F.3d 222 (3d Cir. 2002) 14, 15

Dickerson v. United States,
530 U.S. 428 (2000).....24

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998).....*passim*

Marks v. United States,
430 U.S. 188 (1977).....13, 14

Rappa v. New Castle County,
8 F.3d 1043 (3d Cir. 1994) 14

United States v. Yakubu,
936 F.2d 936 (7th Cir. 1991) 16

Unity Real Estate v. Hudson,
178 F.3d 649 (3d Cir.), *cert. denied*,
528 U.S. 963 (1999).....11, 15

Constitutional Provision:

U.S. Const. amend. V.....*passim*

Statutes:

5 U.S.C. § 701 ..... 1, 2

26 U.S.C. §§ 9701-22 1

26 U.S.C. § 9701(c)(2) 5, 22

26 U.S.C. § 9701(c)(2)(A)(i) 23

26 U.S.C. § 9701(c)(2)(A)(ii)-(iii) 5

26 U.S.C. § 9701(c)(2)(B) 5, 22

26 U.S.C. § 9704 5

26 U.S.C. § 9704(a) 16

26 U.S.C. § 9706(a) 5, 23

26 U.S.C. § 9706(a)(3) ..... *passim*

26 U.S.C. § 9706(b)(1)(A) 22, 23

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 305 F.3d 226 (4th Cir. 2002), and is reprinted in the Appendix hereto at A-1-27.

The Order and Memorandum Opinion of the United States District Court for the Eastern District of Virginia (Payne, D.J.) are reported at 153 F. Supp. 2d 813 (E.D. Va. 2001), and are reprinted in the Appendix hereto at B-1-42.

The Order amending the judgment entered by the United States District Court for the Eastern District of Virginia (Payne, D.J.) is reprinted in the Appendix hereto at C-1-2.

STATEMENT OF JURISDICTION

The judgment for the United States Court of Appeals for the Fourth Circuit was entered on September 18, 2002. The Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution is reproduced in the Appendix hereto at D-1.

The Coal Industry Retiree Health Benefit Act of 1992 is codified at 26 U.S.C. §§ 9701-22 and selective portions are reproduced in the Appendix hereto at D-3-8.

The Administrative Procedure Act is codified at 5 U.S.C. § 701 *et seq.*, and selective portions are reproduced in the Appendix hereto at D-2.

STATEMENT OF THE CASE

This case involves the Commissioner of Social Security's ("Commissioner" or "SSA") refusal to withdraw the assignment of liability for health care premiums for retired coal miners (and their dependents) to A.T. Massey Coal Company, Inc., Massey Coal Services, Incorporated, Peerless Eagle Coal Company and Tennessee Consolidated Coal Company (collectively "Petitioners") under section 9706(a)(3) of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act" or "Act"), 26 U.S.C. § 9706(a)(3), in response to this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

Petitioners sought a ruling that the Commissioner violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, when, in response to the Supreme Court's decision in *Eastern*, the Commissioner voided the assignment of Coal Act beneficiaries to 122 companies that did not sign a 1974 or later coal wage agreement, but refused to void Petitioners' assignments. App. B-6, B-6 n.3. Petitioners' claim was based upon the fact their position is substantially identical to that which was before the Court in *Eastern*, which held that the assignment of liability to a company that did not sign a 1974 or later coal wage agreement was unconstitutional because the 1974 wage agreement was the first to provide that United Mine Workers of America retirees would have lifetime health care.

Petitioners also sought a declaratory judgment that section 9706(a)(3) of the Coal Act is unconstitutional as applied to assignments made to them, because they did not sign a 1974 or later coal wage agreement. App. B-6, B-25.

Finally, Petitioners sought an Order directing Respondent Trustees of the United Mine Workers of America Combined Benefit Fund ("Trustees") to return all

premiums previously paid by Petitioners on behalf of the wrongfully assigned beneficiaries. App. B-6-7.

The United Mine Workers of America Combined Benefit Fund ("Combined Fund") and its Trustees filed a counterclaim against the Petitioners and twenty-three additional companies (on the basis that the additional companies were "related persons" to Petitioners as that term is defined in the Coal Act) seeking a declaratory judgment that the Coal Act is constitutional as applied to Petitioners. App. A-17; App. B-7. The Trustees also sought damages incurred as a result of the Petitioners' failure to pay premiums on behalf of the challenged beneficiaries and injunctive relief requiring Petitioners to pay future premiums and barring Petitioners from disposing of corporate assets. App. A-17; App. B-7. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

On July 19, 2001, the United States District Court for the Eastern District of Virginia denied relief to Petitioners ruling that (1) the Coal Act was constitutional as applied to Petitioners, (2) the Commissioner did not violate the APA when he voided the assignment of Coal Act beneficiaries made to other companies that did not sign a 1974 or later coal wage agreement, but refused to void assignments to Petitioners because, although Petitioners did not sign a 1974 or later agreement, they were not similarly situated to Eastern Enterprises, and (3) denied the Trustees' counterclaim seeking damages and injunctive relief. App. B-38-41. The district court, on August 28, 2001, entered an amended judgment which incorporated a stipulation setting forth the amount of Petitioners' liability to the Combined Fund. App. C-1-2.

The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision holding that the Commissioner did not err in applying section 9706(a)(3) of the Coal Act to make assignments to Petitioners. App. A-26. The court's rationale was based on the operation of separate

provisions of the Coal Act which classify Petitioners as "related persons" to companies that signed 1974 and later coal wage agreements. *Id.* The court reasoned that, since *Eastern Enterprises* is a plurality decision for which no common rule can be identified, the result of that case would only be applicable in this case if Petitioners are "substantially identical" to Eastern Enterprises ("Eastern"). App. A-18-20. The court concluded that Petitioners' statutory status as related persons to post-1974 signatories rendered them not substantially identical to Eastern, and thus held that assignments to Petitioners may constitutionally be made. App. A-23-26.

A. THE COAL INDUSTRY RETIREE HEALTH BENEFIT ACT OF 1992

The history of the Coal Act has been discussed at length in a number of cases including *Eastern Enterprises*, 524 U.S. at 504-15, and *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 122 S. Ct. 941, 946-48 (2002). A brief summary follows.

The Coal Act, enacted in 1992, resulted from concern about the financial stability of the UMWA 1950 Benefit Plan ("1950 Benefit Plan") and the UMWA 1974 Benefit Plan ("1974 Benefit Plan") - collectively bargained retiree health benefit plans created by the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators' Association ("BCOA"). These multiemployer health benefit plans were created and maintained pursuant to a series of National Bituminous Coal Wage Agreements ("NBCWAs") negotiated over several decades by the UMWA and the BCOA. The 1950 NBCWA created the United Mine Workers of America Welfare and Retirement Fund of 1950. Twenty-four years later, in order to comply with the newly enacted Employee Retirement Income Security Act of 1974, the 1974 NBCWA split the Welfare and Retirement Fund of 1950 into four separate plans. Two of these plans, the aforementioned 1950 Benefit Plan and the 1974 Benefit Plan, provided health benefits to eligible UMWA retirees and their dependents.

As regards retiree health benefits, the 1974 NBCWA was a watershed collective bargaining agreement because it was the first coal wage agreement to expressly provide that retirees would have health care for life.

During the term of the 1988 NBCWA, the 1950 and 1974 Benefit Plans encountered severe financial problems. In 1992, in response to these financial difficulties, Congress enacted the Coal Act. The Coal Act merged the 1950 and 1974 Benefit Plans into a new multiemployer plan known as the UMWA Combined Benefit Fund. Under section 9704 of the Coal Act, health care for Combined Fund beneficiaries is financed through the assessment of per-beneficiary premiums to companies that were signatory to a NBCWA ("signatory operators"), and who are assigned beneficiaries by the Commissioner pursuant to section 9706(a) of the Act. 26 U.S.C. §§ 9704, 9706(a). The total premium an assigned operator must pay to the Combined Fund is a function of the number of retired miners and dependents assigned to the operator by SSA. Additionally, section 9704 provides that any related person to an assigned operator is jointly and severally liable for payment of the operator's Combined Fund premiums. An entity is a "related person" to the responsible signatory operator if that entity was a member of a controlled group of corporations which includes the operator on July 20, 1992. 26 U.S.C. § 9701(c)(2).[1]

The Coal Act contains a three-tiered priority that SSA must follow for making assignments of retired UMWA miners to signatory operators. 26 U.S.C. § 9706(a). Under section 9706(a)(3), if the retiree's most recent employer is still in business but did not sign the 1978 or a subsequent coal wage agreement, the retiree is to be assigned to the pre-

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[1] If the responsible signatory operator was not in business on July 20, 1992, then related person status is determined as of the time immediately before the signatory operator ceased to be in business. 26 U.S.C. § 9701(c)(2)(B). Also, other types of corporate relationships, not relevant here, will establish related person status. *See* 26 U.S.C. § 9701(c)(2)(A)(ii)-(iii).

1978 signatory operator that employed him longest. Thus, under section 9706(a)(3) the Commissioner could make assignments to an operator that had not been signatory to a UMWA agreement for thirty or forty years. The assignment rules also provide that where the signatory operator was no longer in business, the Commissioner could make the assignments to a "related person" to the defunct operator.

Companies that did not sign a 1974 or later agreement, but received assignments under section 9706(a)(3), are commonly referred to as "super-reachbacks." Assignments to super-reachbacks were particularly controversial due to their extreme retroactive nature, and the fact the 1974 NBCWA was the first to provide that retirees would have health benefits for life. Assignments to super-reachbacks led to numerous constitutional challenges, which this Court ultimately addressed in *Eastern Enterprises*, 524 U.S. 498.

B. THE *EASTERN ENTERPRISES* DECISION

In June, 1998, this Court considered whether application of section 9706(a)(3) of the Coal Act to assign liability to a company that did not sign a 1974 or subsequent NBCWA was unconstitutional. *Eastern Enterprises*, 524 U.S. at 503-04, 536-38. The Court focused on the 1974 NBCWA as especially significant to its Fifth Amendment analysis because it was the first coal wage agreement to contain language stating UMWA retirees would have health benefits for life. In a 5-4 plurality decision the Court concluded that assignments to companies which did not sign the 1974 NBCWA were void as unconstitutional, primarily because of the "extremely retroactive burden" the Coal Act places on such companies. *Id.* at 538.

1. The Facts of the *Eastern* Case

Eastern conducted extensive coal mining operations until the end of 1965 and signed each NBCWA between 1947 and 1964. *Id.* at 516. At the end of 1965, Eastern transferred its coal-related operations to a wholly-owned subsidiary, Eastern Associated Coal Corp. ("EACC"). *Id.* Eastern retained its 100 percent stock ownership in EACC through a subsidiary corporation until 1987. *Id.* at 516 (plurality), 565-66 (Breyer, J., dissenting). Between 1966 and 1987, Eastern effectively ran EACC, sharing officers and supervising management of EACC. *Id.* at 516 (plurality), 565-66 (Breyer, J., dissenting). Eastern officials, in their role as EACC directors, ratified the post-1965 coal wage agreements, *id.* at 566 (Breyer, J., dissenting), including the 1974 and 1978 agreements, the first ones to expressly refer to or provide guarantees regarding lifetime retiree health care benefits. From 1966 to 1987 Eastern received dividends of more than $100 million from EACC. *Id.* at 516 (plurality), 565-66 (Breyer, J., dissenting). In 1987, Eastern sold EACC to a third party. Following the enactment of the Coal Act in 1992, the Commissioner assigned to Eastern pursuant to section 9706(a)(3) over 1,000 retired miners who had worked for Eastern before 1966, at an estimated cost to Eastern of $50 to $100 million. *Id.* at 517, 529. In its challenge to the Coal Act, Eastern argued, among other things, that it was irrational for the Congress to require it to pay for lifetime health benefits for UMWA retirees when Eastern never signed a UMWA wage agreement promising such benefits. *Id.* at 529-37.

2. The *Eastern* Decision

Five Justices found that the Coal Act was unconstitutional as applied to Eastern. *Id.* at 522-50. A four Justice plurality opinion authored by Justice O'Connor held that the Act effected an unconstitutional taking of Eastern's property and therefore violated the Takings Clause of the Fifth Amendment. *Id.* at 522-38. Justice Kennedy filed an

opinion that concurred in part and dissented in part. *Id.* at 539-50. Justice Kennedy rejected the plurality's Takings Clause analysis but held that the Coal Act violated the Due Process Clause of the Fifth Amendment. *Id.*

Both the plurality and Justice Kennedy concluded that the Coal Act was unconstitutional because it imposed severe, retroactive liability on Eastern without justification. The plurality pointed to the fact that the Coal Act reached back over thirty years to impose liability on Eastern's activities in 1965 and earlier. *Id.* at 532. Justice Kennedy likewise noted that the Coal Act reached back thirty-five years to tag Eastern with liability for lifetime UMWA retiree health benefits that Eastern could never have envisioned in 1965 when it stopped mining coal. Justice Kennedy called this "a retroactive effect of unprecedented scope." *Id.* at 549.

The Court was fully aware of Eastern's ownership and active involvement in the operation of a subsidiary, EACC, that signed not only the 1974 and 1978 coal wage agreements, but the 1981 and 1984 agreements as well. This relationship notwithstanding, the plurality opinion and Justice Kennedy's concurrence both stressed that Eastern was not responsible for creating an expectation of lifetime benefits because *it* did not sign the 1974 agreement, or any subsequent agreement which promised such benefits. *See id.* at 550 (Kennedy J., concurring in part) ("[T]he expectation [of lifetime benefits] was created by promises and agreements made long after Eastern left the coal business."); *see also id.* at 530-31 (plurality). As Justice Kennedy noted, Eastern was not responsible "for the perilous financial condition of the 1950 and 1974 plans which put the benefits in jeopardy." *Id.* at 550.[2] Accordingly, a majority of the

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[2] The plurality also recognized that the financial crisis in the benefit plans was caused initially when the 1974 and 1978 agreements expanded benefits, but that Eastern was not responsible, notwithstanding its ownership of EACC, because Eastern did not itself adopt the plans. *Eastern Enterprises*, 524 U.S. at 531.

Court found section 9706(a)(3) of the Coal Act unconstitutional as applied to Eastern, without regard to the fact that it was also the parent of EACC (and a member of EACC's controlled group) in 1974, and for thirteen years thereafter. *Id.* at 528-29, 549-50.

C. FACTS RELATING TO ASSIGNMENTS MADE TO PETITIONERS

Massey Coal Services, Inc. ("Massey Services") is a subsidiary of A.T. Massey Coal Company ("A.T. Massey"). App. B-23. Neither A.T. Massey nor Massey Services has ever been signatory to a UMWA coal wage agreement, or employed any person under a UMWA agreement. App. B-22-23. Nevertheless, under section 9706(a)(3), the Commissioner assigned A.T. Massey and Massey Services the responsibility to pay premiums to the Combined Fund for thirty-five retired UMWA miners and their dependents. *Id.* None of these retirees were ever employed by A.T. Massey or Massey Services. Rather, they were employed by either Merrill Coal Company ("Merrill"), Gay Mining Company ("Gay Mining"), or Massey Coal Mining Company ("Massey Mining"). *Id.* None of these companies signed a 1974 or later coal wage agreement. *Id.* Indeed, April 18, 1964 was the latest that any of them was signatory to a coal wage agreement.[3]

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[3] Merrill was signatory to UMWA coal wage agreements between 1933 and June 30, 1958. Merrill merged into Gay Mining on July 1, 1958, and ceased to exist. Gay Mining was itself signatory to UMWA wage agreements between 1942 and 1958. Immediately after Merrill merged into Gay Mining in July 1958, Gay Mining changed its name to Massey Coal Mining Company. Massey Mining became a UMWA signatory effective with the June 30, 1958 name change, and it remained signatory to a coal wage agreement until April 18, 1964. Massey Mining changed its name to Ben Creek Coal Company on January 6, 1977, more than twelve years after it was last signatory to a coal wage agreement. App. B-22-23.

Peerless Eagle Coal Company ("Peerless Eagle"), a subsidiary of A.T. Massey, has never been signatory to a UMWA coal wage agreement. App. B-23. The Commissioner assigned Peerless Eagle premium responsibility for twenty-two retired miners and their dependents, based on their employment by Peters Creek Coal Company ("Peters Creek"). *Id.* Peters Creek was last signatory to a coal wage agreement in 1958, and merged into Peerless Eagle on March 1, 1962. *Id.*

Tennessee Consolidated Coal Company ("TCC"), a subsidiary of A.T. Massey, was last signatory to a coal wage agreement in 1960. *Id.* The Commissioner assigned TCC premium responsibility for ninety-nine retired miners (plus their dependents). *Id.*

D. THE COMMISSIONER'S RESPONSE TO *EASTERN ENTERPRISES*

Beginning in September, 1998, the Commissioner engaged in administrative decision making which reflected the agency's acquiescence to the Court's June 25, 1998 decision in *Eastern Enterprises*. Specifically, as of April 1, 1999, the agency had voided *ab initio* beneficiary assignments previously made to at least 122 coal companies that, like Eastern, had not signed a 1974 or later coal wage agreement. App. B-6 n.3.

By letters dated July 29 and August 17, 1998, Petitioners asked the Commissioner to void certain assignments to them in accordance with the Court's decision in *Eastern Enterprises*. By letters dated April 1, 1999, Marilyn G. O'Connell, Associate Commissioner for Program Benefits, denied these requests. *Id.* Ms. O'Connell stated that the agency did not consider the companies similarly situated to Eastern because, unlike Petitioners, Eastern was not a member of a controlled group consisting of a 1974 or later signatory on the date specified under the Coal Act for establishing "related person" liability. *Id.*

E. THE DECISION BELOW

The United States Court of Appeals for the Fourth Circuit reviewed the district court's award of summary judgment to the Commissioner and the Combined Fund *de novo*, and affirmed by a 2-1 majority. App. A-4, A-27. The court characterized Petitioners' claim as turning on a single issue – whether the Commissioner's assignments are unconstitutional under *Eastern Enterprises*.[4] App. A-18. The court first reviewed Justice O'Connor's plurality opinion holding that, under the Fifth Amendment Takings Clause, the magnitude of Eastern's retroactive liability was severely disproportionate to the conduct giving rise to that liability and therefore unconstitutional. App. A-14-15. The court then reviewed Justice Kennedy's concurring opinion, which held that due to the severe retroactive liability of the Commissioner's assignments, Due Process was violated thereby rendering the assignments unconstitutional. App. A-15-16.

The court then determined that, since there is "no theoretical overlap between the rationales employed by the plurality and Justice Kennedy, . . . *Eastern Enterprises* 'mandates judgment for . . . plaintiffs only if they stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence.'" App. A-19-20 (quoting *Unity Real Estate v. Hudson*, 178 F.3d 649, 659 (3d Cir.), *cert. denied*, 528 U.S. 963 (1999)). The court thus identified the task before it as determining "what it means to be in a position 'substantially identical' to that of Eastern" and noted that "[it] must identify and examine the factors that were critical to both the plurality and Justice Kennedy in their respective determinations that the Commissioner's assignments to

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[4] The court also reviewed the standards for reversing final agency action under section 706 of the APA, and determined that its decision upholding the constitutionality of the Commissioner's assignments to Petitioners also disposed of their APA claim. *Id.* App. A-18 n.16.

Eastern were unconstitutional." App. A-20. The court reasoned that "[t]he Massey Plaintiffs are only entitled to succeed here if their position, with respect to every critical factor, is substantially identical to that of Eastern." *Id.* Finally, the court concluded that "a coal operator stands in a position 'substantially identical' to that of Eastern if it had no connection to the 1974 or subsequent NBCWAs." *Id.*

After so defining the parameters of what it means to be "substantially identical" to Eastern, the court proceeded to apply that analysis to the Petitioners. The court noted that since it was clear Petitioners did not sign or operate under the 1974 or subsequent NBCWAs, "it might appear at first glance that the experiences of the Massey Plaintiffs in the coal mining industry are 'substantially identical' to those of Eastern." App. A-23. Ultimately, however, the panel majority concluded that Petitioners' position is not substantially identical to Eastern's, not because of any meaningful factual distinction with respect to Petitioners' connection to 1974 or subsequent NBCWAs, but because Petitioners' factual experience had to be examined against the backdrop of the Coal Act's concepts of "related persons" and "controlled groups". *Id.* The court concluded that it was Congress' intent to aggregate the members of a corporate family into a single entity for the purposes of assigning Combined Fund liability. App. A-24.

The panel majority considered and rejected Petitioners' contention that application of the Coal Act's related person definition to Petitioners could not supply a material fact sufficient to overcome the constitutional deficiency identified in *Eastern*, because Eastern itself had been in a corporate control group with a post-1974 signatory until 1987. App. A-24-26. The court stated that, by virtue of selling EACC prior to July 20, 1992, the Coal Act designates Eastern as a discrete entity, whereas, the Act gathers Petitioners with other companies that were members of its controlled group (on July 20, 1992) for purposes of

determining liability under the Act. App. A-25. Therefore, in examining whether Petitioners' experiences in the coal industry are substantially identical to Eastern's, the court determined that it "must analyze the experiences of the Massey Group as 'related persons,' *i.e.*, as a whole." *Id.*

The court then concluded that since Eastern was no longer related to EACC as of July 20, 1992, EACC's post-1974 employment experiences could not be attributed to Eastern under the Coal Act. *Id.* However, the court reasoned that since the Act's related person provisions applied to Petitioners (because on July 20, 1992 they were related to companies that had signed a 1974 agreement), the post-1974 signatory status of certain of Petitioners' related persons must be attributed to Petitioners, themselves. Based on this analysis the panel majority concluded that Petitioners are not in a position substantially identical to Eastern's. App. A-26.

REASONS FOR GRANTING THE WRIT

The writ should be granted so that the Court may address an important question of federal law that has not been, but should be, settled by this Court.

A. THERE IS A NEED FOR INSTRUCTION ON APPLICATION OF THE "SUBSTANTIALLY IDENTICAL" TEST THAT THE LOWER COURTS HAVE DEVISED TO DETERMINE WHEN TO APPLY THE RESULT OF PLURALITY DECISIONS IN WHICH THERE IS NO CLEAR RULE OF LAW WHICH COMMANDED A MAJORITY

This Court has never had occasion to instruct the lower courts on how to apply the precedent established by decisions which lack a majority opinion and for which the "narrowest grounds" test announced in *Marks v. United States*, 430 U.S. 188 (1977) is not relevant. This case presents both an ideal opportunity and need to do so.

This Court established in *Marks* that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193 (citation omitted). As the lower courts have recognized on various occasions, not every case is suitable for application of the "narrowest grounds" test. *See, e.g., Rappa v. New Castle County*, 18 F.3d 1043, 1058 (3d Cir. 1994). This Court's splintered decision in *Eastern Enterprises* is such a case.

Three appellate courts have considered whether to apply the *Eastern Enterprises* result to the parties before them and have determined that the "narrowest grounds" test is not workable for that decision. App. A-18-19; *Berwind Corp. v. Commissioner of Soc. Sec.*, 307 F.3d 222, 234 (3d Cir. 2002); *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998). Each has concluded that there is no theoretical overlap between the rationales employed by the plurality and Justice Kennedy because neither the plurality's Takings Clause analysis nor Justice Kennedy's substantive due process rationale may be considered to be a subset of the other.

The courts thus have turned to the "substantially identical" test to determine under what circumstances the *Eastern Enterprises* precedent requires the conclusion that assignments are void as unconstitutional.[5] App. A-19-20; *Berwind*, 307 F.3d at 234. The courts agree that in cases in which the "substantially identical" test is to be applied, they are to find for the plaintiff before them only if that person is "in a substantially identical position" to the party in the plurality decision. App. A-19-20; *Berwind*, 307 F.3d at 234.

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[5] The D.C. Circuit, while not calling it a "substantially identical" test, engaged in essentially the same type of analysis in one part of its opinion to compare Eastern to the entities in the case before it, as the other circuits have done. *See Association of Bituminous Contractors*, 156 F.3d at 1256.

Applying the "substantially identical" test in the case below, the Fourth Circuit stated that to "determine what it means to be in a position 'substantially identical' to that of Eastern . . . [the court] must identify and examine the factors that were critical to both the plurality and Justice Kennedy in their respective determinations that the Commissioner's assignments to Eastern were unconstitutional." App. A-20. The court then concluded that

> a coal operator stands in a position "substantially identical" to that of Eastern if it had no connection to the 1974 or subsequent NBCWAs. *See Unity Real Estate*, 178 F.3d at 659 (observing that "[l]anguage in the plurality and the concurrence suggesting that expectations fundamentally changed after 1974" indicates that connection to 1974 and subsequent NBCWAs is a critical factor).

Id.

In considering whether Petitioners met this test, however, the panel majority considered not only whether, like Eastern, Petitioners "had no connection to the 1974 or subsequent NBCWAs" as a factual matter, but also whether Petitioners were connected to a statutorily-defined "related person" which had signed a 1974 or subsequent NBCWA. In so doing, the court expanded the "substantially identical" test, which is meant to take into account only factors critical to the majority, to also include application of the related person provisions of the Coal Act, which have no bearing on the critical facts the plurality and Justice Kennedy relied on in reaching their respective conclusions that assigning super-reachbacks liability to provide benefits for their former employees is unconstitutional. The Third Circuit has done likewise. *See, e.g., Berwind Corp.*, 307 F.3d 222.

While it may be that a properly applied "substantially identical" test is suited to the task at hand, it is apparent that the lower courts have erroneously modified the test in the post-*Eastern Enterprises* cases to deprive litigants in a substantially identical position of the benefit of this Court's constitutional jurisprudence. Where, as here, the lower courts rely on a statutory definition to recharacterize the constitutional significance of facts that were critical to the Court's holding, the lower courts impermissibly limit application of this Court's precedent. There is a need, therefore, for the Court to provide guidance for the lower courts as to how its plurality decision in *Eastern Enterprises*, as well as other similarly fragmented decisions, is to be applied.[6] The remainder of this petition will address this need for clarification as presented by the facts in this case.

B. THE FOURTH CIRCUIT ERRED IN RELYING ON A STATUTORY CONSTRUCT TO FIND THAT PETITIONERS ARE NOT SUBSTANTIALLY IDENTICAL TO EASTERN

As with Eastern Enterprises, the Coal Act had an extreme retroactive effect and imposed a severe financial burden[7] on the Petitioners for a financial crisis

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[6] Although plurality decisions which lack even a narrow theoretical underpinning are not common, they are necessarily an important component of the Court's jurisprudence. The fact that a majority of the Justices are unable to agree on the analytical underpinning for the Court's decision in a particular case does not mean that the result should not be widely applied to all cases which present a substantially identical fact pattern. *See, United States v. Yakubu*, 936 F.2d 936, 939 (7th Cir. 1991) ("The Supreme Court does not sit to decide cases that will control only cases having identical facts.").

[7] Petitioners are jointly and severally liable for their respective premium obligations. *See* 26 U.S.C. § 9704(a). To date that liability is over $1,000,000. App. B-22-23. It will, of course, continue to increase so long as any of the assigned retirees or their dependents remain alive.

that neither they nor the pre-1974 signatories who employed these miners had any responsibility for creating. The facts here are substantially identical to Eastern's in all material respects. The Fourth Circuit acknowledged as much, but erred in going beyond the facts to find that application of a statutory definition created a dispositive distinction between Petitioners and Eastern.

1. Petitioners are substantially identical to Eastern Enterprises.

Like Eastern, neither the Petitioners nor the actual employers of the miners assigned to Petitioners signed any agreement that promised lifetime retiree health benefits. In fact, Petitioners A.T. Massey, Massey Services, and Peerless Eagle never signed any UMWA agreement. There is no dispute that the actual employers of the miners in this case (Merrill, Gay Mining, Massey Mining, Peters Creek and TCC) ceased to be signatory to a coal wage agreement at least ten years before the 1974 NBCWA – the first agreement to promise lifetime health benefits to miners.[8] Plainly, the Coal Act imposes no less a retroactive burden on Petitioners arising out of employment with these companies than it imposed on Eastern.

It was the Coal Act's extreme retroactivity, and its consequent disruption of Eastern's reasonable expectations, that provided the most notable point of agreement between the plurality opinion and Justice Kennedy's concurrence in *Eastern*. *Compare Eastern*, 524 U.S. at 534 (extent of Eastern's retroactive liability is substantial and far reaching) (plurality), *with id.* at 549 (as plurality explains, retroactive effect of the Coal Act is of

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[8] Peters Creek was last signatory in 1958. TCC was last signatory in 1960. Merrill, Gay Mining and Massey Mining were last signatory in 1964.

unprecedented scope) (Kennedy, J., concurrence). Indeed, although there is no common theoretical basis for the holding in *Eastern*, it was the severely retroactive nature of assignments grounded in employment with pre-1974 signatories that provided the common denominator in the opinions which comprise the *Eastern* majority.

For the same reasons it is unconstitutional to make assignments to pre-1974 signatory Eastern Enterprises under section 9706(a)(3), it is unconstitutional to make such assignments to Petitioners. The retroactive effect of the Coal Act on Petitioners is, if anything, more extreme than it was on Eastern because the employers here all ceased to be signatories prior to Eastern.[9] The fact that on July 20, 1992 Petitioners were part of a controlled group that included companies that had signed 1974 and later coal wage agreements does not supply a material fact sufficient to distinguish Petitioners from Eastern, because Eastern itself was related to a company that signed the 1974 and subsequent coal wage agreements. Given that there are no distinctions of consequence between Eastern's facts and those in this case, the Court's decision in *Eastern* compels the conclusion that SSA's assignment of the beneficiaries challenged here violates the Takings and Due Process Clauses of the Fifth Amendment in the same manner, and to the same extent, as those constitutional protections were violated under the analyses articulated in the plurality opinion, and in Justice Kennedy's concurring

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[9] Indeed, in several respects Petitioners' connections to the pre-1974 signatory companies which employed the miners in this case are more attenuated than Eastern's relationship with EACC. For example, unlike Eastern, none of the Petitioners mined coal pursuant to a UMWA contract and then transferred their coal mining operations into a newly formed subsidiary which signed the 1974 and subsequent NBCWAs. Nor did Peerless Eagle, TCC or Ben Creek (or its corporate predecessors Merrill, Gay Mining, and Massey Mining) continue to operate their own mining operations under a NBCWA after 1974, as did Eastern's subsidiary EACC.

opinion. Moreover, the Commissioner's refusal to void Petitioners' assignments separately violates section 706 of the APA.[10]

In analyzing Eastern's claims that the Coal Act was unconstitutional as applied to it, a majority of the Justices in *Eastern* declined to ascribe any constitutional significance to Eastern's ownership of a post-1974 signatory (EACC) for 13 years after the watershed 1974 NBCWA. As Justice O'Connor stated in the plurality opinion, the Commissioner could not justify imposing Coal Act liability on Eastern based on Eastern's continued ownership of its subsidiary, EACC, because "the Act assigns Eastern responsibility for benefits relating to miners that Eastern itself, not EACC, employed, while EACC would be assigned the responsibility for any miners that it had employed." *Id.* at 530. As in *Eastern*, the liability the Commissioner assigned to Petitioners arises solely from pre-1964 employment by super-reachback companies that did not sign the landmark 1974 agreement, not from employment by companies that signed a 1974 or later NBCWA.

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[10] When the Commissioner voided assignments to at least 122 super-reachback operators in response to *Eastern*, she did not consider such factors as the total amount of the operator's liability, the operator's ability to pay, or whether, prior to July 20, 1992, the operator had extensive corporate relationships with companies that had signed the 1974 or later agreements. Indeed, the *only* "fact" that animated the Commissioner's decision to affirm Petitioners' assignments was her determination that, on July 20, 1992, Petitioners were related to a company that had signed a 1974 (or later) NBCWA. If Petitioners are correct that having a corporate relationship to a 1974 signatory on July 20, 1992 does not supply a material fact sufficient to remove their situation from the ambit of the plurality's Takings analysis, and Justice Kennedy's Due Process analysis, then the Commissioner's refusal to void Petitioners' assignments necessarily violates section 706 of the APA because it is arbitrary, capricious, an abuse of discretion, not in accordance with law, and contrary to constitutional right.

2. It is irrelevant to the constitutional question that Petitioners are related to companies that signed the 1974 coal wage agreement.

In considering whether Petitioners are substantially identical to Eastern, the Fourth Circuit recognized that none of them signed or operated under the 1974 or subsequent NBCWAs. App. A-23. It did not end the analysis there, however. Having decided that the critical fact with regard to application of *Eastern* is whether the employer of the miners signed a 1974 or later NBCWA, the court then determined that, in performing the constitutional analysis under the "substantially identical" test, it must consider the Coal Act's related person provisions in determining the employer's signatory status. *Id.* Significantly, the court premised its analysis only on whether Petitioners had a corporate relationship with a 1974 signatory on July 20, 1992, not whether they maintained this corporate connection longer than the thirteen years Eastern maintained its corporate connection to EACC (1974-87). App. A-24-26.

Under the panel majority's analysis, there is no constitutional bar to imposing liability on a super-reachback for its former employees' benefits provided that the super-reachback was related to a 1974 signatory on July 20, 1992. This result follows even though that relationship may not have come into existence until July 1, 1992. In other words, whereas Eastern's ownership of EACC from 1974 to 1987 did not establish a factual connection sufficient to overcome the majority's constitutional concerns, those concerns would have been laid to rest if Eastern had owned EACC during the month of July 1992. Recasting the "substantially identical" test to go beyond the critical facts which compelled the plurality and Justice Kennedy's finding of unconstitutionality led the panel majority to wrongly exclude Petitioners from application of the Court's holding in *Eastern* that liability may not be imposed on a pre-1974 signatory for miners it employed under pre-1974 coal wage agreements.

The panel majority, relying on a statement in the *Eastern* plurality opinion to justify its application of the "substantially identical" test through the lens of the related person definition, observed:

> The plurality [in *Eastern*] acknowledged that, because Eastern sold EACC prior to July 20, 1992, "the Act assign[ed] Eastern responsibility [only] for benefits relating to miners that Eastern itself, not EACC, employed." *Eastern Enters.*, 524 U.S. at 530. The plurality thus found that "Eastern's liability under the Act bears no relationship to its ownership of EACC." And accordingly, the plurality examined Eastern's experience in isolation. *Id.*

App. A-25. The court interpreted these statements to mean that the *Eastern* plurality "expressly deferred to the delineation of entities that Congress chose to make in the Coal Act." *Id.* However, these statements appear in the context of the plurality's discussion of Eastern's conduct vis-à-vis the predecessor funds and, specifically, the fact that Eastern itself did not participate in the agreements in which lifetime health benefits were promised, although its wholly-owned subsidiary EACC did. With these statements, the plurality emphasizes that Eastern's challenge does not involve assignments based on employment with post-1974 signatory EACC.[11]

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[11] In this regard it is important to note that Petitioners are not challenging the constitutionality of "related person" liability. For purposes of this case, Petitioners acknowledge that where liability is properly assigned to an operator that signed a 1974 (or later) coal wage agreement, that liability may also be imposed on non-employers based on their statutory status as a "related person" to the 1974 signatory. It is quite a different thing, however, to say that liability which cannot be imposed on a pre-1974 signatory under the Court's holding in *Eastern* can, by operation of the related person definition, be laundered of its unconstitutionality.

Nowhere does the plurality opinion or Justice Kennedy's concurrence even imply that Eastern's assignments might have been constitutional if Congress had only established the date for determining statutory related person status prior to Eastern's sale of EACC in 1987. Having misconstrued the plurality's comment as direction to take into account related person liability in considering application of the *Eastern* precedent, the panel majority then misread the Coal Act as mandating that the 1974 signatory status of certain of Petitioners' related persons be attributed to Petitioners. The court determined that it was to treat Petitioners as though they were a single employer with their related persons and thus as if they were all 1974 signatory operators.[12] App. A-11-12, A-23-26.

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[12] Congress did not intend for "related person" status to turn a non-signatory "related person" (like A.T. Massey) into a signatory; nor to turn a pre-1974 signatory (such as TCC) into a 1974 signatory. The related person provision exists to make non-employers liable for a signatory operator's Coal Act retiree obligations where that operator is defunct, or otherwise fails to honor its constitutionally enforceable obligations. For purposes of assigning related person liability it is immaterial whether the "related person" was signatory to a coal wage agreement, or was ever in the coal business at all. Related person liability is necessarily derivative in nature. Therefore, if it would be unconstitutional to impose liability on the signatory employer in the first instance, then the related person definition cannot suffice to make it constitutional to impose that liability on a non-employer affiliate.

No provision in the Coal Act authorizes the Commissioner or a court to impute one entity's signing of the 1974 NBCWA to another entity. The related person definition set forth in 26 U.S.C. § 9701(c)(2) simply describes the three types of corporate relationships that will establish related person liability and the date for identifying when the existence of the common ownership relationship will result in affixing liability on the non-employer related person. The panel majority placed significance on section 9706(b)(1)(A) of the Act, which instructs SSA to aggregate (i.e., add together) periods of employment for purposes of making assignments where a miner worked under a wage agreement for more than one related person. App. A-23-24. However, this section simply directs the Commissioner to aggregate a retiree's service among related companies for purposes of determining which of the assignment criteria in section 9706(a) applies for purposes of allocating the retiree to a specific former employer. It does not direct the Commissioner to attribute to a related person the signatory status of the retiree's employer.

Since the Coal Act defines "related person" to consist of controlled group members such as parent-subsidiary, *see* 26 U.S.C. § 9701(c)(2)(A)(i), Eastern and EACC also satisfied the corporate relationship portion of the statutory related person definition through 1987. However, this factual connection to a 1974 signatory was not enough to save the Act from Eastern's as-applied constitutional challenge. That corporate connection simply could not cure the constitutional infirmities of the extreme retroactivity that concerned the majority in *Eastern*. It is simply implausible to conclude (as the panel majority did implicitly) that the plurality or Justice Kennedy would have reached a different conclusion concerning the constitutionality of Eastern's liability had Eastern reacquired EACC (or some other 1974 signatory company) on July 1, 1992.

Imposition of liability on an employer that did not sign the 1974 coal wage agreement is what the Supreme Court specifically held to be unconstitutional in *Eastern*. Petitioners' "related person" status to a 1974 signatory on July 20, 1992 can have no greater bearing on the constitutionality of such assignments than did Eastern's corporate relationship to EACC from 1974 through 1987. *See* 26 U.S.C. § 9706(b)(1)(A). As the decision in *Eastern* demonstrates, a *pre*-1974 signatory employer's corporate relationship to a *post*-1974 signatory does not temper the retroactive effect of the assignments such that they pass constitutional muster.

It is easy to demonstrate that the July 20, 1992 statutory date will not carry the constitutional weight which the Fourth Circuit accorded it. Congress could as easily have set the statutory determination date in section 9701(c)(2)(B) back to December 6, 1974 (the effective date of the 1974 NBCWA). Moving the statutory date would not have affected the Court's constitutional retroactivity analysis, however, because Eastern and EACC were, *in fact*, related persons on December 6, 1974. A statutory definition

which does nothing more than reconfirm a corporate relationship that already existed could not possibly have altered the constitutional analysis in the plurality opinion or Justice Kennedy's concurrence. Sliding the statutory related person date backwards or forwards cannot bridge the substantive constitutional defect identified in *Eastern*, because it is the extreme retroactivity of the assignments to Eastern (and to Petitioners) which lies at the core of their unconstitutionality. The court's conclusion that a statutory provision defining when corporate relationships will have financial consequences can cure the constitutional defect identified in *Eastern* impermissibly substitutes a *statutory* measuring date (July 20, 1992) for a *constitutional* measuring date (signing the 1974 NBCWA). *See Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution.").

This Court's holding in *Eastern* turned principally on the fact that the employer had not promised lifetime benefits to its UMWA miners because it did not sign the watershed 1974 coal wage agreement. *Eastern*, 524 U.S. at 535-37, 550. The same facts exist here. Like Eastern, the Petitioners did not contribute to the expectation of lifetime benefits, nor did they contribute to the financial crisis which led to the creation of a new structure for financing UMWA retiree health care. The Fourth Circuit erred when it relied on a statutory definition establishing when liability may be allocated to non-employers as the sole basis for rejecting Petitioners' position that the result in *Eastern* governs Petitioners' liability for their former employees' benefits. In so doing, the court expanded the "substantially identical" test in a manner which impermissibly restricts the reach and application of this Court's precedent.

CONCLUSION

For all of the forgoing reasons, Petitioners respectfully request that this Petition for a Writ of Certiorari be granted.

JOHN R. WOODRUM
Counsel of Record
MARGARET S. LOPEZ
HEENAN, ALTHEN & ROLES, LLP
1110 Vermont Ave., N.W., Ste. 400
Washington, D.C. 20005
202-887-0800

TABLE OF CONTENTS
Appendix to Petition

Appendix A:

Opinion
United States Court of Appeals
for the Fourth Circuit
entered September 18, 2002 ..... App. A-1

Appendix B:

Order and Memorandum Opinion of
The Honorable Robert E. Payne
Re: Denying Plaintiffs' Motion for Summary
Judgment, Granting Commissioner's Motion for
Summary Judgment , Denying Counterclaim
Plaintiff Trustees' Motion for Summary Judgment
and Dismissing Complaint and Counterclaims
without Prejudice
entered July 19, 2001 ..... App. B-1

Appendix C:

Order of
The Honorable Robert E. Payne
Re: Granting Joint Motion for Order
Amending Judgment
entered August 27, 2001 ..... App. C-1

Appendix D:

U.S. CONST. AMEND. V ..... App. D-1

5 U.S.C. § 706 ..... App. D-2

26 U.S.C. § 9701(c)(2) ..... App. D-3

26 U.S.C. § 9704(a) ..... App. D-5

26 U.S.C. § 9706(a) ..... App. D-6

26 U.S.C. § 9706(b) ..... App. D-8

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 01-2155

A. T. MASSEY COAL COMPANY, INC.;
MASSEY COAL SERVICES, INCORPORATED;
PEERLESS EAGLE COAL COMPANY;
TENNESSEE CONSOLIDATED COAL COMPANY;
RAWL SALES AND PROCESSING COMPANY;
OMAR MINING COMPANY; PM CHARLES COAL
COMPANY; ROCKY HOLLOW COAL CO;
SPROUSE CREEK PROCESSING COMPANY;
BIG BEAR MINING COMPANY;
DEHUE COAL COMPANY;
DOUGLAS POCAHONTAS COAL CORPORATION;
HOPKINS CREEK COAL; JOBONER COAL COMPANY;
MAJESTIC MINING, INCORPORATED;
PERFORMANCE COAL COMPANY;
VANTAGE MINING COMPANY;
RUSSELL FORK COAL COMPANY;
VESTA MINING COMPANY,

Plaintiffs and Counterclaim Defendants-Appellants,

and

BELFRY COAL CORPORATION,
Plaintiff,

v.

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION; MICHAEL H. HOLLAND; WILLIAM P. HOBGOOD; MARTY D. HUDSON; THOMAS O. S. RAND; ELLIOTT A. SEGAL; CARL E. VAN HORN; GAIL R. WILENSKY, Trustees of the United Mine Workers of America Combined Benefit Fund; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND,

Defendants-Appellees,

and

TRACE FORK COAL COMPANY; GOALS COAL COMPANY; GREEN VALLEY COAL COMPANY; LICK BRANCH COAL COMPANY; EAGLE ENERGY, INCORPORATED; POWER MOUNTAIN COAL COMPANY; WILLIAMS MOUNTAIN COAL COMPANY,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District Judge.
(CA-99-83)

Argued: April 3, 2002
Decided: September 18, 2002
[Entered: September 18, 2002]

Before NIEMEYER, KING, and GREGORY, Circuit Judges.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Gregory joined. Judge Niemeyer wrote an opinion concurring in part in the judgment and dissenting in part.

COUNSEL

ARGUED: John Ray Woodrum, HEENAN, ALTHEN & ROLES, L.L.P., Washington, D.C., for Appellants. Peter Buscemi, MORGAN, LEWIS & BOCKIUS, L.L.P., Washington, D.C.; Sharon Swingle, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Margaret S. Lopez, HEENAN, ALTHEN & ROLES, L.L.P., Washington, D.C.; John M. Poma, A.T. MASSEY COAL COMPANY, INC., Richmond, Virginia, for Appellants. Stanley F. Lechner, Charles P. Groppe, MORGAN, LEWIS & BOCKIUS, L.L.P., Washington, D.C.; Samuel M. Brock, III, TROUTMAN, SANDERS, MAYS & VALENTINE, Richmond, Virginia; John R. Mooney, Marilyn A. Baker, MOONEY, GREEN, BAKER & SAINDON, P.C., Washington, D.C.; David W. Allen, Office of the General Counsel, UMWA HEALTH AND RETIREMENT FUNDS, Washington, D.C., for Appellees Trustees. Robert D. McCallum, Jr., Assistant Attorney General, Paul J. McNulty, United States Attorney, Mark B. Stern, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellees.

OPINION
KING, Circuit Judge:

A.T. Massey Coal Company, Massey Coal Services, Peerless Eagle Coal Company, and Tennessee Consolidated Coal Company (the "Massey Plaintiffs") appeal the decision of the district court that rendered them liable for the benefits of certain beneficiaries under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 (the "Coal Act" or the "Act"). The Massey Plaintiffs maintain that their assignments of liability are unconstitutional under the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), and they assert that the assignments also violate the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (the "APA"). For the reasons explained below, we conclude that these contentions are without merit, and we affirm the district court.

I.

This proceeding arises from the efforts of Congress to alleviate a crisis in the funding of retiree health benefits that engulfed the coal industry in the late 1980s. In the wake of spiraling health care costs and declining numbers of coal operators, Congress enacted the Coal Act in 1992 to ensure that retired coal miners and their dependents (the "Beneficiaries") would receive death benefits and adequate health care (the "Benefits"). In order to pay for the Benefits, the Act established a multiemployer benefit plan known as the United Mine Workers of America Combined Benefit Fund (the "Combined Fund"). The Combined Fund is financed by annual premiums assessed against current and former coal operators. It utilizes a complex administrative process to assign liability for Benefits to the operator most clearly connected to a coal miner's employment in the coal industry. The Act places the responsibility for administering this assignment process with the Commissioner of Social Security (the "Commissioner"), and it places the

responsibility for administering the Combined Fund with the Fund's Trustees. Pursuant to his statutory authority, the Commissioner made multiple assignments of liability. Among those assignments were several made to the Massey Plaintiffs, including the assignments at issue in this appeal. Certain entities challenged the efforts of the Commissioner and the Combined Fund to impose liability on them for Benefits due under the Coal Act. In 1998, the Supreme Court overturned the Commissioner's assignments of liability to one former operator, Eastern Enterprises ("Eastern"). *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998). The Court, however, was unable to agree upon the rationale for its ruling: a four-justice plurality voted to invalidate the assignments on one constitutional theory, while Justice Kennedy voted to invalidate the assignments on an alternate constitutional basis.

Certain entities challenged the efforts of the Commissioner and the Combined Fund to impose liability on them for Benefits due under the Coal Act. In 1998, the Supreme Court overturned the Commissioner's assignments of liability to one former operator, Eastern Enterprises ("Eastern"). *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998). The Court, however, was unable to agree upon the rationale for its ruling: a four-justice plurality voted to invalidate the assignments on one constitutional theory, while Justice Kennedy voted to invalidate the assignments on an alternate constitutional basis.

Following the decision in *Eastern Enterprises*, the Commissioner voided several assignments to coal operators that he deemed to be similarly situated to Eastern. The Commissioner did not find the Massey Plaintiffs to be similarly situated, however, and he declined to void the assignments he had earlier made to them. The Massey Plaintiffs then formally requested that certain of their assignments (the "Massey Assignments") be voided, but the Commissioner denied their requests.

In January 1999, the Massey Plaintiffs initiated this suit in the Eastern District of Virginia against the Commissioner, the Combined Fund, and the Fund's Trustees. They contended that the Massey Assignments violate the Takings and Due Process Clauses of the Fifth Amendment, as well as certain provisions of the APA. On cross-motions for summary judgment, the district court, on July 19, 2001, ruled in favor of the defendants, concluding that the Massey Assignments did not contravene the Court's holding in *Eastern Enterprises. A.T. Massey Coal Co., Inc. v. Massanari*, 153 F. Supp. 2d 813 (E.D. Va. 2001).

II.

The events leading to the enactment of the Coal Act have been well chronicled by this and several other courts. *See generally Eastern Enters. v. Apfel*, 524 U.S. 498, 504-16 (1998); *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 294-96 (4th Cir. 2000), *aff'd sub nom. Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 600-02 (4th Cir. 1999); *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161, 164-65 (3d Cir. 1999); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1127-28 (4th Cir. 1996). We therefore only briefly summarize the Act's history.

A.

In 1946, the United Mine Workers of America (the "UMWA") staged a nationwide strike in an effort to secure better health and retirement benefits for its membership. In response, President Truman nationalized the coal mines, and his Secretary of the Interior entered into negotiations with UMWA President John L. Lewis. These negotiations culminated in the historic Krug-Lewis Agreement, which ended the strike and led to the creation of benefit trusts. These benefit trusts were financed by coal production royalties and by payroll deductions. They provided death, disability, retirement, and health benefits for coal miners and their dependents.

Shortly after the Krug-Lewis Agreement, the coal mines were returned to private control, and the UMWA and a multiemployer group of coal operators entered into the National Bituminous Coal Wage Agreement of 1947 (the "1947 NBCWA"). The 1947 NBCWA established the United Mine Workers of America Welfare and Retirement Fund (the "1947 Fund"), which was modeled on the Krug-Lewis benefit trusts. The 1947 Fund was financed exclusively by royalties from coal production, and it provided both pension and health benefits to coal miners and their dependents. The 1947 NBCWA failed to guarantee coal miners any specific benefits, leaving the determination of benefit levels to three trustees of the 1947 Fund.

The acrimony between the UMWA and the coal operators over benefits persisted, however, and in 1950 the UMWA and the coal operators executed a new agreement (the "1950 NBCWA"). The 1950 NBCWA replaced the 1947 Fund with a new fund financed by a perton royalty on coal production (the "1950 Fund"). The 1950 Fund mirrored the 1947 Fund in that it failed to guarantee coal miners any vested benefits, instead leaving the power to adjust or even terminate benefits with the Fund's trustees. Like its predecessor, the 1950 Fund operated on a pay-as-you-go basis, with the trustees adjusting benefit levels to fit budgetary constraints. As such, the 1950 NBCWA provided no guarantee of lifetime benefits to miners.

Although the 1950 NBCWA was amended several times, its structure remained essentially unchanged until 1974. A combination of demographic trends, which had increased the cost of benefits, and the passage of the Employee Retirement Income Security Act ("ERISA"), led in 1974 to the replacement of the 1950 Fund. The UMWA and the Bituminous Coal Operators' Association ("BCOA") entered into a new agreement, the 1974 NBCWA. This agreement replaced the 1950 Fund with four new trusts, financed by a combination of coal production royalties and

premiums based on hours worked by coal miners.[11] Two of these new trusts, the UMWA 1950 Benefit Plan and Trust (the "1950 Benefit Plan") and the UMWA 1974 Benefit Plan and Trust the "1974 Benefit Plan"), provided health benefits for miners.[2] The 1950 Benefit Plan covered coal miners who were already retired, or who retired prior to January 1, 1976, as well as their dependents, while the 1974 Benefit Plan covered coal miners who retired on or after January 1, 1976, as well as their dependents.

The 1974 NBCWA constituted a significant break from the past in that it was the first agreement between the UMWA and the BCOA to provide lifetime health benefits for retirees and their widows (unless a widow remarried). As such, the 1974 NBCWA vastly expanded benefit costs. That increase in payable benefits, combined with other factors (e.g., a decline in coal production, a rise in miner retirements, and the growth of health care costs) caused the 1950 and 1974 Benefit Plans to encounter financial problems. These problems led to the creation of the 1978 NBCWA, which rendered each employer who signed the agreement individually responsible for providing health care benefits for its own active and retired employees. The 1950 and 1974 Benefit Plans, which were to be financed by the coal operators who were party to the 1978 NBCWA, thereafter covered only "orphaned retirees," i.e., retired miners whose employers either had ceased coal mining operations or were no longer party to the NBCWAs. [3] The 1978 NBCWA

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1 In 1951, a large number of coal operators organized themselves into the BCOA, which became the primary representative of coal operators in negotiations with the UMWA.

2 The 1950 Benefit Plan and 1974 Benefit Plan did not cover pension benefits. The 1974 NBCWA established a separate funding plan for pensions.

3 Put simply, orphaned retirees were miners whose employers had left the unionized coal mining industry, either because they no longer mined coal or because they had commenced non-union coal mining operations.

represented a shift in coal operator liability from a "defined contribution" obligation, under which operators were responsible for the payment of production royalties, to a "defined benefit" obligation, under which such operators were obliged to provide sufficient monies to maintain specific benefits.

Despite the changes wrought by the 1978 NBCWA, the 1950 and 1974 Benefit Plans continued to encounter financial problems as costs increased and operators continued to leave the coal mining business. Although additional NBCWAs were agreed to and executed during the 1980s in attempts to address these financial difficulties, they failed to render the 1950 and 1974 Benefit Plans financially viable. In 1989, the threat of insolvency in the 1950 and 1974 Benefit Plans led the UMWA to call a contentious and lengthy strike against the Pittston Coal Company, which was settled only after the Secretary of Labor intervened. As part of that settlement, the federal government formed the Advisory Commission on United Mine Workers of America Retiree Health Benefits. This Commission prepared a report that formulated multiple legislative solutions to the financial problems racking the 1950 and 1974 Benefit Plans, and its recommendations formed the basis for the Coal Act.

B.

Under the Coal Act, the 1950 and 1974 Benefit Plans were merged into the newly created Combined Fund.[4] 26 U.S.C. § 9702(a). The Combined Fund was designed to provide health and death benefits to certain miners and their dependents (i.e., the Beneficiaries) who, prior to July

[4] The Coal Act also established the 1992 UMWA Benefit Plan, which covers certain coal miners and their dependents who are not eligible for benefits from the Combined Fund. 26 U.S.C. § 9712(b). In addition, the Act mandates the continuation of the individual health plans maintained by signatory operators to the 1978 and subsequent NBCWAs. 26 U.S.C. § 9711. These provisions are not at issue in this appeal.

20, 1992, had been receiving or were eligible to receive benefits under the 1950 and 1974 Benefit Plans.[5] 26 U.S.C. §§ 9703(a), (b), (c), & (f). The Combined Fund is financed by annual premiums assessed against "signatory operators," i.e., coal operators who have signed a coal wage agreement,[6] including those signatory operators who are no longer in the coal business. 26 U.S.C. §§ 9701(b)(1), (b)(3), & (c)(1). Those premiums are calculated on the basis of the number of eligible Beneficiaries assigned to a particular operator. 26 U.S.C. §§ 9703(f) & 9704. As we have noted, the responsibility for the assignment of Beneficiaries rests with the Commissioner of Social Security. 26 U.S.C. § 9706(a).[7]

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[5] As such, the Combined Fund provides Benefits only for retired miners who worked under an NBCWA and for those miners' eligible dependents.

[6] A coal wage agreement is either an NBCWA or another agreement that bound the operator to the terms of a prevailing NBCWA.

[7] The assignment provision of the Coal Act, found at § 9706(a) of Title 26, provides in relevant part as follows:

> [T]he Commissioner of Social Security shall . . . assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or related person with respect to which) remains in business in the following order:
> (1) First, to the signatory operator which –
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.
> (2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which –
> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.
> (3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

The Coal Act contemplates the possibility that, by engaging in creative corporate restructuring, a signatory operator might avoid its liability. *See* 138 Cong. Rec. S17604 (daily ed. Oct. 8, 1992) (Conference Committee Report). In order to preclude such avoidance, the Act designates certain closely related entities as "related persons," and it treats those entities for purposes of Combined Fund liability as though they were a single employer. *See* 26 U.S.C. § 9706(b)(1)(A). Furthermore, the Coal Act subjects related persons to joint and several liability for a signatory operator's premiums. 26 U.S.C. § 9704(a).

Under the Act, "[a] person shall be considered to be a related person to a signatory operator if that person is . . . a member of the controlled group of corporations . . . which includes such signatory operator; . . . [or] a successor in interest to any [such] person." 26 U.S.C. § 9701(c)(2). The Act spells out three types of corporate relationships that constitute a "controlled group of corporations." The relevant relationship for our purposes is known as a "parent-subsidiary controlled group." 26 U.S.C. § 1563(a)(1).[8] Whether a corporate entity is a "related person" to a signatory operator is determined by that entity's relationship to the signatory operator as of July 20, 1992. 26 U.S.C. § 9701(c)(2)(B).

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[8] Section 1563(a)(1) of Title 26 defines the parent-subsidiary controlled group as follows:

> (1) *Parent-subsidiary controlled group.* — One or more chains of corporations are connected through stock ownership with a common parent corporation if —
>
> (A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except for the common parent corporation, is owned . . . by one or more of the other corporations; and
>
> (B) the common parent corporation owns . . . stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations . . . .

Thus, under the "related person" provision of the Coal Act, corporations that have never signed an NBCWA, as well as those that have never taken part in the mining industry, may be liable for Benefits. In effect, the Coal Act treats the corporate family as a single employer for the purpose of assigning liability for Benefits. In fact, the Act specifically provides, in 26 U.S.C. § 9706(b)(1)(A), that "[a]ny employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator."

C.

The lead plaintiff here, A.T. Massey Coal Company ("A.T. Massey") is the parent of several wholly owned corporate subsidiaries, including the other Massey Plaintiffs,[9] that are engaged in coal mining operations. *See A.T. Massey Coal Co. v. Int'l Union, UMWA*, 799 F.2d 142, 144 (4th Cir. 1986) (observing that A.T. Massey and its affiliates function as "a single production entity with sales, transportation and distribution coordinated from Massey's Richmond headquarters"). The Massey Plaintiffs have stipulated that the Massey corporate family (the "Massey Group"), of which they are a part, constitutes a "controlled group of corporations" within the meaning of the Coal Act, and that the corporations within the Massey Group are therefore "related persons." Thus, each Massey Plaintiff is a "related person" with respect to each of the other three Plaintiffs, as well as to a host of other coal operators within the Massey Group, such as Omar Mining Company ("Omar Mining"), Sprouse Creek Processing

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[9] The other three Massey Plaintiffs are: Massey Coal Services, Inc. ("Massey Coal Services"), Peerless Eagle Coal Company ("Peerless Eagle"), and Tennessee Consolidated Coal Company ("Tennessee Consolidated").

Company ("Sprouse Creek"), and Big Bear Mining Company ("Big Bear").[10]

Pursuant to the assignment provisions of the Coal Act, specifically 26 U.S.C. § 9706(a)(3), the Commissioner made the Massey Assignments under challenge here. The Commissioner assigned A.T. Massey liability for eighty-two retired coal miners, based on its relationship as the parent of Ben Creek Coal Company ("Ben Creek") and Ben Creek's corporate predecessors (Merrill Coal Company, Gay Mining Company, and Massey Coal Mining Company). The Commissioner similarly assigned Massey Coal Services liability for two retired coal miners, based on its relationship to Ben Creek. Peerless Eagle was assigned liability for a total of forty-five retired coal miners who had worked for Peters Creek Coal Company, which merged with Peerless Eagle in 1962. Finally, the Commissioner assigned liability to Tennessee Consolidated for 204 retired coal miners that it had directly employed.[11]

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[10] In addition to Omar Mining, Sprouse Creek, and Big Bear, other members of the Massey Group include appellants PM Charles Coal Company; Rocky Hollow Coal Company; Dehue Coal Company; Douglas Pocahontas Coal Corporation; Hopkins Creek Coal Company; Joboner Coal Company; Majestic Mining, Incorporated; Performance Coal Company; Vantage Mining Company; Russell Fork Coal Company; and Vesta Mining Company.

[11] In many instances, the Commissioner assigned liability to the Massey Plaintiffs for the Benefits of coal miners who were deceased when the Combined Fund began providing benefits in February 1993. In such cases, no premiums were assessed against the Massey Plaintiffs; those assignments were made to demonstrate the basis on which a coal miner's eligible dependents were assigned to the Massey Plaintiffs. Moreover, the number of beneficiaries for whom premiums have been assessed has declined due to mortalities occurring since 1993. Thus, by 1999 – the most recent plan year for which the parties have provided data – A.T. Massey was responsible for 30 beneficiaries, Massey Coal Services for 2 beneficiaries, Peerless Eagle for 22 beneficiaries, and Tennessee Consolidated for 80 beneficiaries.

Among the Massey Plaintiffs, only Tennessee Consolidated has signed an NBCWA, last doing so in 1960. Other members of the Massey Group, however, signed the 1974 or subsequent NBCWAs, such as Omar Mining (which signed the 1974, 1978, 1981, and 1984 NBCWAs), Sprouse Creek (which signed the 1974, 1978, and 1981 NBCWAs), and Big Bear (which signed the 1978 and 1981 NBCWAs).

D.

After its enactment, the Coal Act was challenged in various judicial proceedings. Although many of these legal assaults were unsuccessful, a notable exception was a lawsuit brought by Eastern Enterprises ("Eastern") in the District of Massachusetts. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Supreme Court held that the Coal Act, as applied to Eastern, was unconstitutional.

Eastern was a coal operator that had been in the coal mining business from 1929 until 1965. It had signed every NBCWA between 1947 and 1964. In 1965, Eastern transferred its coal mining operations to a wholly owned subsidiary, Eastern Associated Coal Corporation ("EACC"), and it then withdrew from active involvement in the coal industry. EACC thereafter signed several subsequent NBCWAs, including the 1974, 1978, and 1988 agreements. In 1987, Eastern sold its interest in EACC, and it thereafter had no connection to the coal mining industry. After enactment of the Coal Act, the Commissioner, pursuant to 26 U.S.C. § 9706(a)(3), assigned liability to Eastern for over a thousand retired miners whom it had employed prior to its departure from the coal mining industry in 1965. These assignments made Eastern liable for payments to the Combined Fund of more than fifty million dollars. Eastern brought suit against the Commissioner, challenging these assignments and contending that they violated the Takings and Due Process Clauses of the Fifth Amendment.

Although a majority of the Court upheld Eastern's challenge to the assignments, the Court offered no unified rationale for its holding. Justice O'Connor, writing for herself, Chief Justice Rehnquist, and Justices Scalia and Thomas, concluded that the Coal Act's assignments of liability to Eastern represented an unconstitutional taking. *Eastern Enters.*, 524 U.S. at 537-38. This plurality of the Court observed that economic legislation may be unconstitutional if "it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 52829. The plurality opinion observed that the Coal Act required Eastern to pay premiums to ensure that beneficiaries possessed benefits for life, and that such lifetime benefits were not part of any coal wage agreements prior to the 1974 NBCWA. *Id.* at 535. Because Eastern had left the coal mining business in 1965, the plurality concluded that the Act imposed "such a disproportionate and severely retroactive burden upon Eastern," that its assignments were unconstitutional under the Takings Clause. *Id.* at 536-38.

Justice Kennedy, who provided the fifth vote for invalidation of the Eastern assignments, explicitly rejected the plurality's Takings Clause analysis, and he instead concluded that the Coal Act, as applied to Eastern, violated the Due Process Clause. *Id.* at 546-50 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy maintained that "retroactive laws of great severity" could contravene due process, and that such retroactive legislation is particularly problematic when it is not being used to remedy a past wrong. *Id.* at 549. He observed that the assignments to Eastern had a "retroactive effect of unprecedented scope," in that they reached back over thirty years. *Id.* According to Justice Kennedy, Eastern's departure from the coal mining industry prior to the 1974 NBCWA meant that it had played no role in the fiscal crisis that engulfed the industry in the 1970s and

1980s. *Id.* As such, he concluded that the Commissioner's assignments of liability to Eastern could in no way be viewed as a remedy for Eastern's past conduct, and that the assignments thus contravened due process.[12] *Id.*

E.

In the wake of the *Eastern Enterprises* decision, the Commissioner voided several assignments to coal operators that he deemed "similarly situated" to Eastern. He declined, however, to void the Massey Assignments, even though those assignments were for coal miners who had worked, prior to the 1974 NBCWA, for coal operators who had not signed the 1974 or any subsequent NBCWA. The Commissioner concluded that the Massey Assignments were proper because the Massey Plaintiffs are part of a "controlled group" of corporations, as defined in 26 U.S.C. § 1563(a)(1), that include several signatories to the 1974 NBCWA or subsequent NBCWAs.

In January 1999, the Massey Plaintiffs brought suit against the Commissioner, the Combined Fund, and the Fund's Trustees, contending that the Massey Assignments violated both the Constitution – specifically the Takings and Due Process Clauses of the Fifth Amendment – and the

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12 The four dissenting Justices, with Justice Breyer authoring the primary dissenting opinion, concluded that Eastern's assignments did not violate any Fifth Amendment guarantees. *Eastern Enters.*, 524 U.S. at 565-67 (Breyer, J., dissenting). Like Justice Kennedy, the dissenters expressly rejected the plurality's Takings Clause analysis. *Id.* at 554. Thus, the Court voted five-four that the Eastern assignments were not an unconstitutional taking. However, the four dissenters also expressly rejected Justice Kennedy's conclusion that the assignments violated due process. Hence, with the plurality declining to address that issue, only one Justice (Justice Kennedy) subscribed to the notion that the Eastern assignments violated due process. As a result, there was no single constitutional theory under which a majority of the Justices agreed that the Eastern assignments were unconstitutional.

APA.[13] By their complaint, the Massey Plaintiffs sought a refund from the Combined Fund of the premiums they had paid as a result of the Massey Assignments. In response, the Combined Fund and its Trustees filed counterclaims against the Massey Plaintiffs and other members of the Massey Group, i.e., other companies under the common ownership or control of A.T. Massey.[14] The counterclaimants sought a declaratory judgment that the Coal Act, as applied to the Massey Plaintiffs and the other counterclaim defendants, violates neither the Takings nor Due Process Clause; and they sought an injunction requiring the counterclaim defendants to pay the premiums due the Combined Fund under the Act.

By its opinion of July 19, 2001, the district court awarded summary judgment to the Commissioner, the Combined Fund, and the Fund's Trustees, concluding that the Massey Assignments did not contravene the Court's holding in *Eastern Enterprises. A.T. Massey Coal Co., Inc. v. Massanari*, 153 F. Supp. 2d 813 (E.D. Va. 2001). The district court, however, denied the counterclaims of the Combined Fund and its Trustees.[15] The Massey Plaintiffs and the other counterclaim defendants have appealed, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

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[13] A fifth Massey company, Belfry Coal Corporation ("Belfry"), was also a plaintiff in the district court. On April 28, 2000, the Commissioner declared void the assignments challenged by Belfry. Belfry's claims against the Commissioner and the Combined Fund are therefore moot, and Belfry is not a party to this appeal.

[14] The Commissioner filed a separate answer to the complaint, and he did not assert any counterclaims.

[15] In light of the district court's decision, the parties entered into a stipulation, dated August 22, 2001, under which the Massey Plaintiffs agreed to pay all premiums assessed by the Combined Fund plus interest, while the Combined Fund agreed to issue an appropriate refund if the Massey Plaintiffs prevailed at a later date. The district court then amended its opinion to account for the stipulation. *A.T. Massey Coal Co., Inc. v. Massanari*, CA No. 3:99cv83, Order (E.D. Va. Aug. 28, 2001).

III.

The parties agree that the material facts of this case are not in dispute. They also agree that this appeal involves only questions of law. Under controlling authority, we review the district court's award of summary judgment de novo. *Holland v. Pardee Coal Co.*, 269 F.3d 424, 430 (4th Cir. 2001).

IV.

Although the Massey Plaintiffs assert that the Massey Assignments violate both the Constitution and the APA, their appeal turns on a single issue – whether those assignments are unconstitutional under *Eastern Enterprises*.[16] Before we can evaluate this question, however, we must first ascertain the holding of *Eastern Enterprises*.

A.

It is well established, under *Marks v. United States*, 430 U.S. 188 (1977), that when a decision of the Court lacks a majority opinion, the opinion of the Justices concurring in the judgment on the "narrowest grounds" is to be regarded as the Court's holding. 430 U.S. 188, 193 (1977). The *Marks* rule does not apply, however, unless "the narrowest opinion represents a `common denominator of the Court's reasoning' and `embod[ies] a position implicitly approved by at least five Justices who support the judgment.'" *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254 (D.C.

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16 As a final agency decision, the Commissioner's assignment of beneficiaries is governed by the APA. *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 301 (4th Cir. 2000), *aff'd sub nom. Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002). Under § 706 of the APA, the Commissioner's decision may be set aside only if it was either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity." In this case, the Massey Plaintiffs contend that the Massey Assignments must be set aside because those assignments are contrary to the Court's holding in *Eastern Enterprises*. Therefore, in deciding the constitutional issue, we also dispose of the Massey Plaintiffs' APA claim.

Cir. 1998) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991)). In *Eastern Enterprises*, Justice Kennedy specifically rejected the plurality opinion's reliance on Takings Clause jurisprudence, and he instead based his conclusion on a due process theory that the plurality expressly declined to address. *Compare Eastern Enters. v. Apfel*, 524 U.S. 498, 537-38 (1998) ("Because we have determined that the [Coal Act] violates the Takings Clause as applied to Eastern, we need not address Eastern's due process claim."), *with id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part) ("I concur in the judgment holding the Coal Act unconstitutional but disagree with the plurality's Takings Clause analysis, which, it is submitted, is incorrect."). Our analysis of the two opinions finds no theoretical overlap between the rationales employed by the plurality and Justice Kennedy; as such, "Justice Kennedy's substantive due process reasoning is not a `narrower' ground that we might take to constitute the controlling holding." *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 658 (3d Cir. 1999); *see also Association of Bituminous Contractors*, 156 F.3d at 1254-55. Thus, consistent with the other courts that have analyzed this question, we conclude that *Eastern Enterprises* "mandates judgment for . . . plaintiffs only if they stand in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence."[17] *Unity Real*

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[17] We note that *Eastern Enterprises* does not stand for the legal proposition that the Eastern assignments under the Coal Act contravene the Takings Clause. As the district court properly observed, "it is clear that [a] majority of the Court [in *Eastern Enterprises*, i.e., Justice Kennedy and the four dissenters] believed that the Coal Act, and its assessment of premiums, did not constitute a taking within the ambit of the Fifth Amendment." *A.T. Massey Coal Co., Inc. v. Massanari*, 153 F. Supp. 2d 813, 825 (E.D. Va. 2001); *see also Unity Real Estate*, 178 F.3d at 659 ("[W]e are bound to follow the five-four vote against the takings claim in *Eastern*."). Nor can *Eastern* stand for the proposition that the Eastern assignments are unconstitutional under the Due Process Clause, because only Justice Kennedy arrived at such a conclusion. It is this absence of consensus on the part of the Court that prompts us to apply *Eastern Enterprises* only to coal operators that stand in a position substantially identical to that of Eastern.

Estate, 178 F.3d at 659; *see also Association of Bituminous Contractors*, 156 F.3d at 1254-55.

Therefore, in order to determine whether the Massey Plaintiffs may constitutionally be subjected to liability for the Massey Assignments, we must determine what it means to be in a position "substantially identical" to that of Eastern. In so doing, we must identify and examine the factors that were critical to both the plurality and Justice Kennedy in their respective determinations that the Commissioner's assignments to Eastern were unconstitutional. The Massey Plaintiffs are only entitled to succeed here if their position, with respect to every critical factor, is substantially identical to that of Eastern. As explained below, our assessment of the plurality opinion of JusticeO'Connor and the separate concurring opinion of Justice Kennedy leads us to conclude that a coal operator stands in a position "substantially identical" to that of Eastern if it had no connection to the 1974 or subsequent NBCWAs. *See Unity Real Estate*, 178 F.3d at 659 (observing that "[l]anguage in the plurality and the concurrence suggesting that expectations fundamentally changed after 1974" indicates that connection to 1974 and subsequent NBCWAs is a critical factor).

1.

Justice O'Connor's plurality opinion emphasized that the magnitude of Eastern's retroactive liability was severely disproportionate to the conduct giving rise to that liability. The plurality observed that, while Congress has "considerable leeway to fashion economic legislation," and that it may impose retroactive liability under certain circumstances, an economic regulation may nonetheless constitute an impermissible taking "if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of the liability is substantially disproportionate to the parties'

experience." *Eastern Enters.*, 524 U.S. at 528-29. Applying that observation to Eastern, the plurality noted that it was the 1974 NBCWA that "first suggest[ed] an industry commitment to the funding of lifetime health benefits for both retirees and their family members." *Id.* at 530-31. Accordingly, "[n]ot until 1974 . . . could lifetime medical benefits under the multiemployer agreement have been viewed as promised." *Id.* at 535.

Eastern, though, had left the coal industry in 1965, and it had been party only to NBCWAs that promised unvested benefits, fully subject to later alteration and termination. *Id.* at 529-32. The plurality dismissed as irrelevant the fact that Eastern's wholly owned subsidiary, EACC, was party to the 1974 expanded benefits regime, and that EACC continued mining coal until 1987. The plurality maintained that "Eastern's liability under the Act bears no relationship to its ownership of EACC." *Id.* at 530. "[T]he Act assigns Eastern responsibility for benefits relating to miners that Eastern itself, not EACC, employed." *Id.* Because the Act grounded Eastern's liability exclusively in Eastern's own conduct, the plurality assessed the constitutionality of Eastern's liability on the same terms. Given Eastern's particular, pre-1974 experience and its expectations in the coal mining industry, the plurality reasoned that the retroactive liability to which Eastern had been subjected was unconstitutionally disproportionate. *Id.* at 536-38.

2.

Justice Kennedy's separate opinion similarly relies on the fact that Eastern left the coal mining industry prior to the pivotal 1974 NBCWA. Justice Kennedy, though, emphasized the unfairness of holding Eastern retroactively liable for a benefits crisis that it had not helped to precipitate. He observed that our legal tradition has long disfavored retroactive economic legislation, because such legislation "can destroy the reasonable certainty and

security which are the very objects of property ownership." *Id.* at 548 (Kennedy, J., concurring in the judgment and dissenting in part). He therefore concluded that "due process protection must be understood to incorporate our settled tradition against retroactive laws of great severity." *Id.* at 549. In defining "retroactive laws of great severity," Justice Kennedy focused on both (1) the degree of retroactive effect, i.e., how much time had passed since the conduct that gave rise to liability, and (2) whether the liability in question was remedial, in that it imposed "an actual, measurable cost of the employer's business which the employer had been able to avoid in the past." *Id.* (quotation and citation omitted).

Justice Kennedy determined that the assignments to Eastern, by creating liability for Eastern's conduct in the 1950s and 1960s, had "a retroactive effect of unprecedented scope." *Id.* at 549-50. Because such retroactive liability could be justified only if it served a remedial purpose, only those coal operators who "were responsible for [the] expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 benefit plans [created by the 1974 NBCWA]" could reasonably be held responsible for providing lifetime benefits. *Id.* at 550. Since Eastern had neither promised lifetime benefits nor precipitated the funding crises of the 1970s and 1980s, Justice Kennedy concluded that the Coal Act, as applied to Eastern, represented "one of those rare instances in which even [the] permissive standard [of the Due Process Clause] has been violated." *Id.*

3.

In sum, Eastern's pre-1974 departure from the coal industry and its status as a nonparty to the 1974 and subsequent NBCWAs were critical both to the plurality and to Justice Kennedy in their respective determinations that the Commissioner's assignments to Eastern were

unconstitutional. Consequently, the Massey Plaintiffs stand in a position "substantially identical" to that of Eastern only if they neither signed nor operated under the 1974 or subsequent NBCWAs.

B.

Having assessed what it means to be in a position "substantially identical" to that of Eastern, we turn to the question of whether the Massey Plaintiffs are so situated. As explained below, we conclude that they are not.

Under *Eastern Enterprises*, a coal operator cannot be assessed Coal Act premiums if it signed and operated only under pre-1974 NBCWAs. As such, it would initially seem that our inquiry is simply whether any of the Massey Plaintiffs signed or operated under the 1974 or subsequent NBCWAs. Because it is clear that they did not, it might appear at first glance that the experiences of the Massey Plaintiffs in the coal mining industry are "substantially identical" to those of Eastern.

Under the Coal Act, however, we are not to view the experiences of the Massey Plaintiffs in isolation; any such examination would be at odds with the Coal Act's concepts of "related persons" and "controlled groups." As discussed above, the Act provides that "[a]ny employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator." 26 U.S.C. § 9706(b)(1)(A). Under this provision, each member of a controlled group of corporations, such as the Massey Group, is treated for Combined Fund liability purposes as though it had employed every miner who worked for any member of the group.[18]

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[18] The Act further emphasizes the statutory unity of the members of a controlled group by holding the members jointly and severally liable for each other's obligations under the Coal Act. 26 U.S.C. § 9704(a).

Looking beyond the terms of the statute, we find further evidence of Congress's plain intent to aggregate the members of a corporate family into a single entity for the purpose of assigning Combined Fund liability. The Conference Committee Report stated that "because of the complex corporate structures which are often found in the coal industry, the number of entities made jointly and severally liable for a signatory operator's obligations is intentionally very broad." 138 Cong. Rec. S17604 (daily ed. Oct. 8, 1992) (Conference Committee Report). In essence, the Act recognizes that coal operators frequently reorganize their corporate structures and spin off or consolidate subsidiaries. Congress recognized that while those reorganizations alter corporate relationships, they leave the nature of a coal operator's involvement in the industry unchanged. Thus, the Coal Act looks beyond the corporate form, focusing on the collective experiences of a "controlled group" rather than on the particular experiences of ever-shifting member entities.

The Massey Plaintiffs contend that their related person status with respect to coal operators who signed the 1974 and subsequent NBCWAs has no bearing on whether their position is "substantially identical" to that of Eastern. They observe that Eastern's wholly owned subsidiary, EACC, operated in the coal mining business during the critical post-1974 period, and that it signed the 1974 and subsequent NBCWAs. They concede that Eastern sold EACC in 1987, and that because the Coal Act determines related person status as of July 20, 1992, Eastern and EACC are not statutory "related persons." The Massey Plaintiffs assert, however, that the fact that Eastern had no statutory "related person" is irrelevant to our constitutional inquiry. The Massey Plaintiffs point out that the July 20, 1992, statutory date for the determination of related person status represents an arbitrary choice by Congress. The key point, the Plaintiffs assert, is that the corporate relationship between Eastern and EACC in the post-1974 NBCWA

period was functionally the same as that between the Massey Plaintiffs and their related persons (such as Omar Mining and Big Bear) who, like EACC, signed the 1974 and subsequent NBCWAs. Accordingly, the Massey Plaintiffs maintain that their experiences in the coal mining industry are "substantially identical" to those of Eastern.

The Massey Plaintiffs overlook the fact that the *Eastern Enterprises* plurality expressly deferred to the delineation of entities that Congress chose to make in the Coal Act. The plurality acknowledged that, because Eastern sold EACC prior to July 20, 1992, "the Act assign[ed] Eastern responsibility [only] for benefits relating to miners that Eastern itself, not EACC, employed." *Eastern Enters.*, 524 U.S. at 530. The plurality thus found that "Eastern's liability under the Act bears no relationship to its ownership of EACC." And accordingly, the plurality examined Eastern's experience in isolation. *Id.*

Just as the *Eastern* Court deferred to Congress's statutory delineation of entities under the Coal Act, this Court likewise must take the parties as the Act defines them. The Coal Act designates Eastern, by virtue of its sale of its coal mining subsidiary prior to July 20, 1992, as a discrete entity. By contrast, the Act gathers the Massey Plaintiffs together with the other members of the Massey Group for purposes of determining Combined Fund liability. Regardless of how members of the Group might prefer to be viewed, Congress has, for our purposes, effectively designated these "related persons" as a single legal entity under the Coal Act. Consequently, in evaluating whether the Massey Plaintiffs' experiences in the coal industry are substantially identical to those of Eastern, we may not artificially segregate those plaintiffs from the other members of the Massey Group. Rather, we must analyze the experiences of the Massey Group as "related persons," i.e, as a whole.

Looking thus through the lense of the Coal Act's "related persons" framework, we find that the Massey Plaintiffs are part of an entity whose experiences in the coal mining industry are not substantially identical to those of Eastern. In *Eastern Enterprises*, the Court determined that it was unconstitutional to subject a coal operator to fifty million dollars in retroactive liability when that operator had engaged exclusively in pre-1974 coal mining activities, and when it had neither assented to, nor contributed to the foundering of, the expanded, post-1974 NBCWA retirement benefits regime. Here, we face the question of whether it is constitutional to subject to substantial liability a coal operator – the Massey Group – that has carried on coal mining activity throughout the crucial post-1974 period, and that has assented to and participated in the post-1974 NBCWA regime. Unlike Eastern, several members of the Massey Group (such as Omar Mining and Big Bear) signed the 1974 and subsequent NBCWAs. Attributing the employment experiences of those signatory operators to the rest of the Massey Group – as the Coal Act's "related person" provisions require us to do – and mindful that an operator is "substantially identical" to Eastern only if its experiences in the mining industry are confined to the pre-1974 NBCWA era, we find the position of the Massey Plaintiffs easily distinguishable from that of Eastern. Because the Massey Plaintiffs do not stand in a position "substantially identical" to that of Eastern, the Commissioner's assignments of liability to the Massey Plaintiffs are not unconstitutional under *Eastern Enterprises*.

V.

For the foregoing reasons, the challenges of the Massey Plaintiffs to the Massey Assignments are without merit, and we affirm the district court.

AFFIRMED

NIEMEYER, Circuit Judge, concurring in part in the judgment and dissenting in part:

I would find that the assignments of liability for coal workers' pensions to A.T. Massey Coal Company, Inc., Massey Coal Services, Inc., and Peerless Eagle Coal Company are unconstitutional by virtue of the Supreme Court's holding in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). With respect to those assignments, I would reverse. Otherwise, I concur in the judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

A.T. MASSEY COAL COMPANY, INC., MASSEY COAL SERVICES, INC., PEERLESS EAGLE COAL CO., TENNESSEE CONSOLIDATED COAL CORPORATION,

Plaintiffs,

v. Civil Action No. 3:99cv83

Larry G. MASSANARI,
Acting Commissioner of Social Security,

and

MICHAEL H. HOLLAND, MARTY D. HUDSON, THOMAS O.S. RAND, ELLIOT A. SEGAL, CARL E. VAN HORN, GAIL R. WILENSKY and WILLIAM P. HOBGOOD, as Trustees of the United Mine Workers of America,

Defendants,

MICHAEL H. HOLLAND, MARTY D. HUDSON, THOMAS O.S. RAND, ELLIOT A. SEGAL, CARL E. VAN HORN, GAIL R. WILENSKY and WILLIAM P. HOBGOOD, as Trustees of the United Mine Workers of America,

Counterclaim Plaintiffs,

v.

A.T. MASSEY COAL COMPANY, INC., MASSEY COAL SERVICES, INC., PEERLESS EAGLE COAL CO., TENNESSEE CONSOLIDATED COAL CORP., RAWL SALES AND PROCESSING CO., OMAR MINING CO., PM CHARLES COAL CO., ROCKY HOLLOW COAL CO., SPROUSE CREEK PROCESSING CO., BIG BEAR MINING CO., DEHUE COAL CO., DOUGLAS POCAHONTAS COAL CORP., HOPKINS CREEK COAL CO., JOBONER COAL CO., MAJESTIC MINING, INC., PERFORMANCE COAL CO., VANTAGE MINING CO., RUSSELL FORK COAL CO., and VESTA MINING CO.,

Counterclaim Defendants.

[Entered: July 19, 2001]

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that:

(1) pursuant to Fed. R. Civ. P. 25(d), Larry G. Massanari, Acting Commissioner of the Social Security Administration ("the Commissioner"), is hereby substituted for Defendant Kenneth S. Apfel, former Commissioner of the Social Security Administration;

(2) the Plaintiffs' Motion for Summary Judgment is DENIED;

(3) the Commissioner's Motion for Summary Judgment is GRANTED;

(4) the Counterclaim Plaintiff Trustees' Motion for Summary Judgment is DENIED; and

(5) the Complaint is dismissed with prejudice and the Counterclaims are dismissed without prejudice.

The Clerk is directed to send a copy of this Order to all counsel of record.

It is so ORDERED.

\s\ Robert E. Payne
United States District Judge

Richmond, Virginia
Date: July 19, 2001

In The
United States District Court, E.D. Virginia,
Richmond Division.

A.T. MASSEY COAL COMPANY, INC.,
Massey Coal Services, Inc., Peerless Eagle Coal Co.,
Tennessee Consolidated Coal Corporation,
Plaintiffs,

v.

Larry G. MASSANARI,
Acting Commissioner of Social Security,

and

Michael H. Holland, Marty D. Hudson, Thomas O.S. Rand,
Elliot A. Segal, Carl E. Van Horn, Gail R. Wilensky and
William P. Hobgood, as Trustees of the United Mine
Workers of America,
Defendants,

Michael H. Holland, Marty D. Hudson, Thomas O.S. Rand,
Elliot A. Segal, Carl E. Van Horn, Gail R. Wilensky and
William P. Hobgood, as Trustees of the United Mine
Workers of America,
Counterclaim Plaintiffs,

v.

A.T. Massey Coal Company, Inc., Massey Coal Services,
Inc., Peerless Eagle Coal Co., Tennessee Consolidated
Coal Corporation, Rawl Sales and Processing Co., Omar
Mining Co., PM Charles Coal Co., Rocky Hollow Coal Co.,
Sprouse Creek Processing Co., Big Bear Mining Co.,
Dehue Coal Co., Douglas Pocahontas Coal Corp.,
Hopkins Creek Coal Co., Joboner Coal Co., Majestic Mining,
Inc., Performance Coal Co., Vantage Mining Co.,
Russell Fork Coal Co., and Vesta Mining Co.,
Counterclaim Defendants.

No. CIVA 3:88CV83.

[Entered: July 19, 2001]

John R. Woodrum, Heenan, Althen & Roles, Washington, D.C., John M. Poma, Esquire, A.T. Massey Coal Company, Inc., Richmond, VA, for Plaintiffs.

Debra J. Prillaman, Assistant United States Attorney, United States Attorney's Office, Richmond, Richard G. Lepley, Esquire, Brian G. Kennedy, Department of Justice, Civil Division, Washington, DC, for Massanari.

Samuel M. Brock, III, Troutman Sanders Mays & Valentine LLP, Richmond, VA, Charles P. Groppe, Peter Buscemi, Stanley F. Lechner, Morgan, Lewis & Bockius, L.L.P., David W. Allen, UMWA Health & Retirement Funds, John R. Mooney, Mooney Green, Gleason, Baker, Gibson & Saiden, PC, Washington, DC, for Trustees.

MEMORANDUM OPINION

PAYNE, District Judge.

This action involves the application of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § § 9701-9722 (the "Coal Act" or the "Act"), to the plaintiff coal companies and the assessment of liability thereunder for healthcare premiums benefitting retired coal miners. The Plaintiffs in this action are: A.T. Massey Coal Company, Inc.; Massey Coal Services, Inc.; Peerless Eagle Coal Co.; and Tennessee Consolidated Coal Co. (collectively "Plaintiffs" or "Massey Plaintiffs"). [1] The Defendants are

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[1] At one point, Belfry Coal Corporation ("Belfry") was also a plaintiff in this action, however, on April 28, 2000, the SSA voided the assignments made to Belfry, thereby rendering its action against the Defendants moot.

Larry G. Massanari, Acting Commissioner of Social Security[2] and Michael H. Holland, Marty D. Hudson, Thomas O.S. Rand, Elliot A. Segal, Carl E. Van Horn, Gail R. Wilensky, and William P. Hobgood, Trustees for the United Mine Workers of America. The Plaintiffs assert that Defendant Massanari, acting for the Social Security Administration ("SSA"), has unconstitutionally assigned to them responsibility for paying the health care premiums for certain retired coal miners, and their dependents, who previously had worked for either the Plaintiffs or their related companies. The specific assertion made by the Plaintiffs is that the decision of the Supreme Court of the United States in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) precludes the Commissioner from constitutionally assigning to the Plaintiffs the responsibility for paying these premiums.[3]

The Plaintiffs seek: (1) a declaratory judgment that the Coal Act is unconstitutional as applied to them (Count I (due process), Count II (takings)); (2) a judgment that SSA violated the Administrative Procedure Act 5 U.S.C. § 701, *et seq.*, when, pursuant to the Supreme Court's decision in *Eastern Enterprises*, it voided the assignment of Coal Act beneficiaries made to companies similarly situated to Plaintiffs, but refused to void assignments to Plaintiffs (Count III); and (3) an Order directing defendant Trustees of the United Mine Workers' Association Combined Benefit

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[2] Pursuant to Rule 25(d)(1), Mr. Massanari has been substituted for Kenneth S. Apfel, former Commissioner of the Social Security Administration.

[3] As of April 1, 1999, SSA, in compliance with the *Eastern Enterprises* decision, voided *ab initio* beneficiary assignments previously made to at least 122 coal companies that SSA deemed to be similarly situated to Eastern. Also, on April 1, 1999, SSA denied the Plaintiffs' request to void the assignments of beneficiaries to them, explaining that they are not similarly situated to the plaintiff in *Eastern Enterprises*.

Fund ("the Trustees") to return all premiums previously paid by Plaintiffs on behalf of the wrongly assigned beneficiaries (Count IV (unjust enrichment)[4] and VI (action for refund of payments under Employee Retirement Income Security Act)). [5]

In its counterclaims, the Combined Fund seeks: (1) a declaratory judgment that the Coal Act is constitutional as applied to companies like the Plaintiffs; (2) damages incurred as a result of the Plaintiffs' failure to pay the statutorily mandated premiums to the Combined Fund; and (3) injunctive relief requiring the Plaintiffs to pay the premiums and prevent the Plaintiffs from improperly disposing of corporate assets. The Combined Fund added the following related coal companies as counterclaim defendants: Rawl Sales and Processing Co., Omar Mining Co., PM Charles Coal Co., Rocky Hollow Coal Co., Sprouse Creek Processing Co., Big Bear Mining Co., Dehue Coal Co., Douglas Pocahantas Coal Corp., Hopkins Creek Coal Co., Joboner Coal Co., Majestic Mining, Inc., Performance Coal Co., Vantage Mining Co., Russell Fork Coal Co., and Vesta Mining Co.

The Plaintiffs have filed a motion for summary judgment requesting judgment as a matter of law in its their favor on their claims. The Commissioner has likewise filed a motion for summary judgment on the Plaintiffs' claims and the Trustees seek summary judgment on their counterclaims. The parties agree that the material facts are not in dispute and that the matter is appropriate for decision

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[4] Although the Plaintiffs caption Count IV in their Complaint as being directed against the Commissioner of the Social Security Administration, the substance of the count reveals that it is an allegation of unjust enrichment and a request for restitution against the Combined Fund.

[5] Inexplicably, the Complaint does not contain a Count V.

as a matter of law.[6] For the following reasons, summary judgment is granted in favor of the Defendant Commissioner on the Plaintiffs claims and summary judgment is denied on the Trustees' counterclaims.

STATEMENT OF FACTS

I. The Coal Act

A. Factual History Leading to the Enactment of the Coal Act

The history of the Coal Act is quite detailed and has been laid out comprehensively in numerous court decisions, including the *Eastern Enterprises* decision.[7] Hence, it will be recanted here but briefly. In 1946, a nationwide strike among coal miners erupted as a result of demands by the United Mine Worker's Association ("UMWA") that coal operators provide better health care benefits for their employees. *See Eastern Enterprises*, 524

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6 During the course of this litigation, SSA questioned whether, considering the decision of the United States Court of Appeals for the Fourth Circuit in *Pittston Co. v. United States*, 199 F.3d 694 (4th Cir.1999), this Court had jurisdiction over this action. The parties were directed to file briefs on the matter and the Court held resolution of the current dispute in abeyance pending the Fourth Circuit's consideration of the jurisdictional issue in *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291 (4th Cir.2000). The parties agree that, pursuant to the decision in *Sigmon*, this Court properly has jurisdiction to decide all matters herein raised. *Id.* at 303. The Court concurs in that assessment.

7 *See Eastern Enterprises*, 524 U.S. at 504-16, 118 S.Ct. 2131; *see also Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291 (4th Cir.2000); *Holland v. Big River Minerals Corp.*, 181 F.3d 597 (4th Cir.1999), *cert. denied*, 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000), *cert. denied* 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000); *Anker Energy Corp. v. Consolidated Coal Co.*, 177 F.3d 161 (3rd Cir.1999), *cert. denied sub nom., Anker Energy Corp. v. United Mine Workers of America Combined Benefit Fund*, 528 U.S. 1003, 120 S.Ct. 496, 145 L.Ed.2d 383 (1999); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649 (3rd Cir.1998), *cert. denied*, 528 U.S. 963, 120 S.Ct. 396, 145 L.Ed.2d 309 (1999)

U.S. at 504-05, 118 S.Ct. 2131.[8] After intervention by the federal government, the UMWA and several coal operators entered into the National Bituminous Coal Wage Agreement of 1947 ("1947 NBCWA"). *Id.* at 505, 118 S.Ct. 2131. The 1947 NBCWA established a trust fund, financed by royalties on coal produced, designed to provide pension and medical benefits to miners and their dependents. *Id.* at 505-06, 118 S.Ct. 2131.

In 1950, 1968, and 1971 new NBCWAs were adopted, each only slightly changing the terms and structure of the original agreement and providing for increases in the amount of royalties paid to the fund based on coal production. *Id.* at 506, 118 S.Ct. 2131. Essentially, under all four of those agreements, the miners and their families were never promised any specific benefits; instead the trustees of the fund had the discretion to establish and adjust the level of benefits provided. *Id.* at 506-07, 118 S.Ct. 2131. Significantly, the agreements did not guarantee lifetime health benefits for retirees or their dependents. *Id.* at 508, 118 S.Ct. 2131.

After Congress passed the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, which required specific funding and vesting of pension plans, the UMWA entered into a new NBCWA with the Bituminous Coal Operators' Association ("BCOA"), a multiemployer bargaining association created in 1951 to be the primary representative of coal operators in negotiations with the UMWA. *Id.* at 509, 118 S.Ct. 2131. The 1974 NBCWA, which was funded by royalties on coal production and premiums based on hours worked by miners, created four trusts funds. *Id.* Two of the trust funds covered retiree health benefits: the 1950 Benefit Plan provided health benefits to coal workers who retired

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[8] Unless otherwise noted, all citations to *Eastern Enterprises* hereinafter refer to the plurality opinion.

before 1976 and the 1974 Benefit Plan covered those who retired on or after January 1, 1976. *Id.* The 1974 NBCWA, unlike any of its predecessors, expressly provided lifetime benefits to retirees and provided benefits to their widows until their death or remarriage. *Id.*

Soon after their creation, the 1950 and the 1974 Benefit Plans encountered financial difficulties attributable to: (i) the increased benefits provided by the 1974 NBCWA; (ii) a decline in the demand for coal; (iii) the retirement of an entire generation of miners; and (iv) the increasing costs of health care. *Id.* at 510, 118 S.Ct. 2131. In an attempt to alleviate the financial burden and in a move towards decentralization of the health-care benefit system organization, the next NBCWA, signed in 1978, ("the 1978 NBCWA") gave signatory employers the responsibility of providing health care to their own current and retired miners. *Id.* at 510, 118 S.Ct. 2131; *see also Sigmon Coal,* 226 F.3d at 295. The 1974 Benefit Plan, financed by the remaining participating coal operators, was restricted to cover only "orphaned" retirees whose former employers were no longer in business or otherwise ceased contributing to the funds. *Sigmon Coal,* 226 F.3d at 295. The 1978 NBCWA contained two provisions intended to ensure the plan's solvency: first, a "guarantee" clause requiring signatories to make sufficient contributions to maintain benefits during the agreement; and, second, an "evergreen" clause which required signatories to contribute to the fund as long as they were in the coal industry, regardless of whether they signed any subsequent agreements. *Eastern Enterprises,* 524 U.S. at 510, 118 S.Ct. 2131.

Notwithstanding this attempt to shore up the financial problems of the funds, the financial decline rapidly progressed because of increasing costs and the withdrawal of employers from the 1978 NBCWA. *Id.* To

address the problem, the federal government established an Advisory Commission on United Mine Workers of America Retiree Health Benefits ("Coal Commission"), which, after extensive studies, proposed a solution that was submitted to Congress. *Id.* at 511-12, 118 S.Ct. 2131. In the end, Congress passed the Coal Act, which was a modified version of the Coal Commission's recommendation. *Id.* at 514, 118 S.Ct. 2131.

B. The Provisions of the Coal Act

The Coal Act, *inter alia,* combined the 1950 and 1974 Benefit Plans and created a new multiemployer plan called the United Mine Workers of America Combined Benefit Fund ("Combined Fund"). *See* 26 U.S.C. § 9702(a)(2); *Eastern Enterprises,* 524 U.S. at 514, 118 S.Ct. 2131. The Combined Fund is designed to provide health and death benefits to coal industry retirees and their dependents who (1) were eligible to receive benefits from the 1950 or 1974 Benefit Plans and (2) were receiving benefits as of July 20, 1992. *See* 26 U.S.C. § 9703.[9] To finance the Combined Fund, the Act assesses annual premiums against "signatory operators," which the Act defines as coal operators who have signed any coal wage agreement.[10] *See* 26 U.S.C. § 9701(c)(1). Any signatory coal operator who "conducts or derives revenue from any business activity, whether or not in the coal industry," may be required to

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[9] The Coal Act also establishes the "1992 UMWA Benefit Plan," which provides health benefits coverage to eligible beneficiaries who are not covered by the Combined Fund. *See* 26 U.S.C. § 9712(b). Further, the Coal Act also mandates continuation of individual health plans maintained by signatories to the 1978 and later NBCWAs. 26 U.S.C. § 9711. These provisions are not at issue here.

[10] The statute defines "coal wage agreement" as any NBCWA, or "any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required" the provision of health benefits to its retirees or contributions to the 1950, 1974 or any prior Benefit Plan. 26 U.S.C. § 9701(b)(1)(A), (B).

contribute to the Combined Fund. 26 U.S.C. §§ 9701(c)(7), 9706(a). *See generally Eastern Enterprises*, 524 U.S. at 514, 118 S.Ct. 2131.

The premiums are calculated based on the number of retired coal miners and dependents (collectively "beneficiaries") assigned to the company. *See* 26 U.S.C. § 9704. The Coal Act directs the SSA Commissioner to assign beneficiaries to signatory operators based on the following three-tiered system:

> [the Commissioner shall assign the beneficiary to] a signatory operator which (or any related person with respect to which) remains in business in the following order:
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> (1) First, to the signatory operator which –
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> (A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
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> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.
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> (2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which –
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> (A) was a signatory operator to the 1978 coal wage agreement or any subsequent coal wage agreement, and
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> (B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

26 U.S.C. § 9706(a).

A "related person," who may also be liable for contributing to the Combined Fund, is defined in the statute as follows:

> a person shall be considered to be a related person to a signatory operator if that person is—
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> (i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;
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> (ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or
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> (iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

> A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

26 U.S.C. § 9701(c)(2). Congress mandated that the relationship of related persons shall be determined as of July 20, 1992. *See* 26 U.S.C. § 9701(c)(2)(B).

Section 52(a) provides that "all employees of all corporations which are members of the same controlled group of corporations shall be treated as employed by a single employer." The statute then provides that "the term 'controlled group of corporations' has the meaning given to such term by section 1563(a) ..." 26 U.S.C. § 52(a). Section § 1563(a), in turn, sets out three different types of controlled groups. The only category of controlled group relevant to this case is the "parent-subsidiary controlled group" which is defined as:

> (1) Parent-subsidiary controlled group--One or more chains of corporations connected through stock ownership with a common parent corporation if--(A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned (within the meaning of subsection (d)(1)) by one or more of the other corporation; and (B) the common parent corporation owns (within the meaning of subsection (d)(1)) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at

> least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.

26 U.S.C. § 1563(a). The parties here have stipulated that the Plaintiffs fall within this definition of parent-subsidiary controlled group and are therefore "related persons" within the statutory definition.

The Coal Act also aggregates the employment of retirees by each "related person" in a controlled group of corporations: "Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator." 26 U.S.C. § 9706(b)(1)(A). Furthermore, in assessing liability for premiums to be paid to the Combined Fund, § 9704(a) states that "any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator." 26 U.S.C. § 9704(a).

II. The Supreme Court's Decision in *Eastern Enterprises*

In *Eastern Enterprises*, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451, the Supreme Court held that the Coal Act was unconstitutional as applied to certain former employers who had been assessed premiums by the Commissioner of the SSA. Eastern Enterprises ("Eastern") had conducted coal mining operations from 1929 until 1965, signing each NBCWA agreement executed between 1947 and 1964. *Id.* 524 U.S. at 516, 118 S.Ct. 2131. In 1965, Eastern transferred all of its coal-related operations to a subsidiary, Eastern Associated Coal Corporation ("EACC"), but retained a stock

interest in EACC. *See id.* EACC signed every NBCWA executed after 1965. *See id.* at 566, 118 S.Ct. 2131. (Breyer, J.,dissenting). *See also* Brief for the Federal Respondent, 1998 WL 25533, at *17. ("EACC was a signatory to the 1974, 1978, and 1988 agreements that expressly guaranteed lifetime benefits to all ligible miners and dependents."). In 1987, Eastern sold all of its interest in EEAC, and thereafter had no connections to the coal mining industry. *See Eastern Enterprises,* 524 U.S. at 516, 118 S.Ct. 2131.

Pursuant to § 9706(a) of the Coal Act and based on Eastern's status as a pre-1978 signatory operator for whom the miners had worked the longest period of time, the Commissioner of the SSA assigned to Eastern responsibility for paying the health care premiums for over 1,000 retired miners and their dependents. *Id.* at 517, 118 S.Ct. 2131. All of those miners had worked for Eastern before 1966. *Id.* The total liability for the premiums exceeded $50 million. *Id.* at 529, 118 S.Ct. 2131. Eastern sued the SSA Commissioner asserting that the assignment violated Eastern's substantive due process rights and constituted a taking of its property in violation of the Fifth Amendment of the United States' Constitution. *Id.* at 517, 118 S.Ct. 2131.

In an opinion in which no single rationale garnered a majority of votes, the Supreme Court held that the Coal Act, as applied to Eastern, was unconstitutional. Four justices found that the application of the Coal Act to Eastern violated the Fifth Amendment as an unconstitutional taking. *Id.* at 529-537, 118 S.Ct. 2131. Four justices found that the Act violated neither the Takings Clause nor Eastern's due process rights. *Id.* at 550-568, 118 S.Ct. 2131. Justice Kennedy, concurring in the judgment and dissenting in part, believed that the Coal Act did not work an unconstitutional taking, concluding instead that the retroactive nature of the Act violated Eastern's due process rights. *Id.* at 539-550, 118 S.Ct. 2131.

A. The Plurality Opinion

The plurality agreed with Eastern that the assignment was an unconstitutional taking due to the extreme retroactive reach of the Act. "Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised." *Eastern Enterprises*, 524 U.S. at 537, 118 S.Ct. 2131. To arrive at this conclusion, the plurality employed a three-factor test which considered: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with the claimant's reasonable investment-backed expectation; and (3) the character of the governmental action. *Id.* at 518, 118 S.Ct. 2131.

Applying this test, the plurality concluded that the economic impact was considerable--between $50 and $100 million. *Id.* at 529, 118 S.Ct. 2131. While acknowledging that this type of financial burden was not a *per se* taking because it was not a permanent physical occupation of Eastern's property, the plurality explained that the Court's decisions considering the constitutionality of similar legislative schemes, *id.* at 524, 118 S.Ct. 2131, "suggest[ed] that an employer's statutory liability for multiemployer plan benefits should reflect some 'proportion[ality] to its experience with the plan.' " *Id.* at 530, 118 S.Ct. 2131 (quoting *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993)). *See also id.* at 528, 118 S.Ct. 2131 ("Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience").

As applied to Eastern, the requisite proportionality was lacking, the plurality reasoned, because:

> [w]hile Eastern contributed to the 1947 and 1950 [benefit plans], it ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the Benefit Plans under the 1974, 1978 or subsequent NBCWA's. *It is the latter agreements that first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members.*
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> The company's obligations under the Act depend solely on its roster of employees some 30 to 50 years before the statute's enactment, without any regard to responsibilities that Eastern accepted under any benefit plan the company itself adopted.

Id. at 530-31, 118 S.Ct. 2131 (emphasis added).

As to Eastern's investment-backed expectations, the plurality noted that "[t]he Act's beneficiary allocation scheme reaches back 30-50 years to impose liability against Eastern based on the company's activities between 1946 and 1965 ... [The Act thereby] attaches new legal consequences to an employment relationship completed before its enactment." *Id.* at 532, 118 S.Ct. 2131 (citations omitted). The plurality found the fact that Eastern had not signed the 1974 NBCWA particularly significant because "*[n]ot until 1974 ... could lifetime medical benefits under the multiemployer agreement have been viewed as promised.*" *Id.* at 535, 118 S.Ct. 2131 (emphasis added). However, in 1974, Eastern was no longer in the coal-mining industry, therefore, the plurality

believed it unfair to allocate premiums to Eastern based on its past actions or any prior agreements, "implicit or otherwise," by the company. *Id.* at 535- 36, 118 S.Ct. 2131.

In assessing the third factor, the nature of the government's actions, the plurality acknowledged the Congressional desire to solve a "grave problem in the funding of retired coal miners' health benefits," but "[w]hen ... that solution singles out certain employers to bear a burden that is substantial in amount, based on the employer's conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause." *Id.* at 537, 118 S.Ct. 2131. Thus, the plurality concluded that the Act effected an unconstitutional taking as applied to Eastern. *Id.*

As to Eastern's Due Process claim, the plurality recognized that "this Court has expressed concerns about using the Due Process Clause to invalidate economic legislation." *Id.* (citing *Ferguson v. Skrupa*, 372 U.S. 726, 731, 83 S.Ct. 1028, 1031, 10 L.Ed.2d 93 (1963)). Because the plurality "determined that the third tier of the Coal Act's allocation scheme violates the Takings Clause as applied to Eastern, [it did] not address Eastern's due process claim." *Id.* at 538, 118 S.Ct. 2131.

B. Justice Kennedy's Concurring Opinion

Justice Kennedy provided the fifth vote which held the Coal Act unconstitutional as applied to Eastern, but he disagreed with the plurality's analysis of the Takings Clause, explaining that: "the mechanism by which the Government injures Eastern is so unlike the act of taking specific property that it is incongruous to call the Coal Act a taking, even as that concept has been expanded by the

regulatory takings principle." *Id.* at 542, 118 S.Ct. 2131 (Kennedy, J., concurring). Instead, Justice Kennedy concluded: "Given that the constitutionality of the Coal Act appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation, ... the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." *Id.* at 545, 118 S.Ct. 2131 (Kennedy, J., concurring).

Noting that the Court has long "harbored a distrust of retroactive statutes," *id.* at 537, 118 S.Ct. 2131, Justice Kennedy acknowledged that that "[w]hile we have upheld the imposition of liability on former employers based on past employment relationships, the statutes at issue were remedial, designed to impose an 'actual, measurable cost of [the employer's] business' which the employer had been able to avoid in the past." *Id.* at 549, 118 S.Ct. 2131 (Kenney, J., concurring) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976)). As applied to Eastern, the Coal Act did not serve any remedial purpose. *Id.* at 549-550, 118 S.Ct. 2131 (Kennedy, J., concurring). Eastern had not created any expectation of lifetime health benefits, (because it had not signed the 1974 or subsequent NWBCA) and it had not been responsible for the financial turmoil in the benefit funds. *Id.* at 550, 118 S.Ct. 2131 (Kennedy, J., concurring). Rather, Justice Kennedy agreed with the plurality's conclusion that "the expectation was created by promises and agreements made long after Eastern left the coal business." *Id.* (Kennedy, J., concurring).

Therefore, despite the deferential view applied to substantive due process challenges to economic legislation, Justice Kennedy believed that the extreme retroactive nature of the liability constituted "one of those rare instances in which even such a permissive standard has been violated." *Id.* at 550, 118 S.Ct. 2131 (Kennedy, J., concurring).

C. The Dissent's Opinion

The four dissenting Justices argued that the Coal Act effected neither an unconstitutional taking, nor did it interfere with Eastern's due process rights. *Id.* at 550-68, 118 S.Ct. 2131 (Stevens, J. dissenting and Breyer, J. dissenting). Agreeing with Justice Kennedy, the dissent found that the Takings Clause was not applicable to this case because it did not concern a governmental taking of private property to serve the public good. *Id.* at 554, 118 S.Ct. 2131 (Breyer, J. dissenting). "This case involves, not an interest in physical or intellectual property," which has been the traditional focus of the Takings Clause, "but an ordinary liability to pay money, and not to the Government, but to third parties." *Id.* at 554, 118 S.Ct. 2131 (Breyer, J., dissenting).

Like Justice Kennedy, the dissenting justice concluded that "[t]he question involved--the potential unfairness of retroactive liability--finds a natural home in the Due Process Clause, a Fifth Amendment neighbor." *Id.* at 556, 118 S.Ct. 2131 (Breyer, J., dissenting). Writing for the dissenters, Justice Breyer believed that "even though Eastern left the coal industry in 1965, the historical circumstances, taken together, prevent Eastern from showing that the Coal Act's 'reachback' liability provision so frustrates Eastern's reasonable settled expectations as to impose an unconstitutional liability." *Id.* at 559, 118 S.Ct. 2131 (Breyer, J., dissenting). The dissent based this conclusion on the fact that the statute imposed liability on Eastern only for the miners that it employed, *id.;* Eastern benefitted from the employment of the miners, *id.* at 560, 118 S.Ct. 2131; Eastern contributed to making the implicit promise to miners of post-retirement benefits, even though Eastern did not sign the 1974 or subsequent NBCWAs, *id.* at 560-565, 118 S.Ct. 2131; and Eastern continued to obtain profits from the coal mining industry long after it left the industry in 1965, through its wholly owned subsidiary

EACC. *Id.* at 565-66, 118 S.Ct. 2131. Therefore, the Act did not violate either the Takings clause or the Due Process clause.

In sum, five justices rejected the takings theory, and only one decided the issue on due process grounds.

III. MASSEY COAL COMPANIES

A.T. Massey Coal Company ("A.T.Massey") is the parent company to numerous wholly-owned subsidiaries who are engaged in coalmining operations. Three of these subsidiaries join A.T. Massey as Plaintiffs in this action. The Plaintiffs have been assigned liability for paying premiums for retired coal miners and their dependants based on 26 U.S.C. § 9706(a)(3). It is undisputed that A.T. Massey and its subsidiaries comprise a "controlled group of corporations," as defined by the Coal Act. *See* 26 U.S.C. § 9701(c).

A. A.T. Massey

A.T. Massey has been assigned responsibility for paying, at varying points since February 1993, the premiums on a total of 82 retired coal miners and dependants, resulting in a total liability of $758,229.21. Despite its involvement with numerous subsidiaries who signed coal wage agreements, A.T. Massey has never signed a UMWA wage agreement. All 82 of the miners were employed by an A.T. Massey subsidiary named Ben Creek Coal ("Ben Creek") or a corporate predecessor of Ben Creek. The corporate history of Ben Creek is quite complex, though it need be discussed only briefly here.

In 1958, shortly after signing the 1958 UMWA, Merrill Coal, a subsidiary of A.T. Massey, merged with Gay Mining Company, also an A .T. Massey subsidiary. Gay

Mining signed the 1958 UMWA before changing its name in 1958 to Massey Coal Mining Company ("Masey Coal Mining"). The mining company operated under this name from 1958 to 1977 and signed the 1964 UMWA during this time period. In 1977, the company again changed its name, this time to Ben Creek Coal.

B. Massey Coal Services, Inc.

Massey Coal Services, Inc. ("Massey Coal Services"), a wholly-owned subsidiary of A.T. Massey, has been assigned, at varying points since February 1993, a total of two beneficiaries under the Coal Act, resulting in a total liability of $34,473.25. The assigned beneficiaries formerly worked for Ben Creek or its corporate predecessors. Like the parent company A.T. Massey, Massey Coal Services has never signed a UMWA wage agreement.

C. Peerless Eagle Coal Company

Peerless Eagle Coal Co. ("Peerless Eagle") has been assigned, at varying points since February 1993, a total of 45 beneficiaries resulting in a total liability of $447,877.75 in premiums. The retired miners at issue here were employed by Peters Creek Coal Company ("Peters Creek"), a coal mining company that merged into Peerless Eagle in 1962. Though Peters Creek last signed a NBCWA in 1958, Peerless Eagle has never signed a NBCWA.

D. Tennessee Consolidated Coal Company

Tennessee Consolidated Coal Company ("TCC") has been assigned, at varying points since 1993, a total of 204 beneficiaries, resulting in a total liability of $1,807,220.92 in premiums for the former miners of TCC. TCC last signed a coal wage agreement in 1960.

E. Other A.T. Massey Subsidiaries

Numerous wholly-owned subsidiaries of A.T. Massey, who are not plaintiffs to this action, signed the 1974 or subsequent NBCWAs, including: (1) Omar Mining (1974, 1978, 1981, and 1984 NBCWAs); (2) Douglas Pocahontas (1974, 1978, and 1981 NBCWAs); (3) Hopkins Creek (1978, 1981, and 1984 NBCWAs); (4) Russell Fork (1974, 1978, and 1981 NBCWAs); (5) Big Bear (1978 and 1981 NBCWAs); (6) Rocky Hollow (1974, 1978, and 1981 NBCWAs); (7) Majestic Mining (1974, 1978, 1981, and 1984 NBCWAs); (8) Dehue (1981 NBCWA); (9) PM Charles (1974 and 1978 NBCWAs); (10) Sprouse Creek (1974, 1978, and 1981 NBCWAs); (11) Vesta (1981 NBCWA); (12) Vantage Mining (1984 NBCWA); and (13) Joboner (1978 and 1981 NBCWAs).

DISCUSSION

I. Summary Judgment Standard

Summary judgment is to be rendered "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The party seeking summary judgment assumes the initial responsibility of establishing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Catawba Indian Tribe of South Carolina v. South Carolina*, 978 F.2d 1334, 1339 (4th Cir.1992), *cert. denied*, 507 U.S. 972, 113 S.Ct. 1415, 122 L.Ed.2d 785 (1993); Fed.R.Civ.P. 56(c). Once this initial showing under Rule 56(c) is made, the burden of production shifts to the non-moving party, who must then "designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly

supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis added). "The evidence of the non-movant is to be believed" and "all justifiable inferences are to be drawn in his favor." *Id.* at 255, 106 S.Ct. 2505.

The parties here agree that there are no genuine issues of material fact in dispute.[11] Therefore, the issues being only those of law, the case is ripe for summary judgment.

II. The Constitutional Challenge

Resolution of the Plaintiffs' request for a declaration that the Coal Act is unconstitutional, as applied to them, essentially resolves the remaining claims and counterclaims. Therefore, the analysis will be made in that context. The dispositive question is whether the Plaintiffs are in a substantially identical position to the plaintiff in *Eastern Enterprises* such that the decision in *Eastern Enterprises* necessitates the conclusion that the Coal Act is unconstitutional as applied to the Plaintiffs. The Plaintiffs (who did not sign the 1974 or subsequent NBCWA) contend that the assignment to them of beneficiaries (who worked for the Plaintiff companies or other non-signatory companies) on the basis of the Plaintiffs' "related person" status to companies that signed the post-1974 NBCWAs, effects an unconstitutional taking and a violation of due process under the Fifth Amendment.

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[11] The briefs raised one possible dispute of fact concerning the correct employer for a deceased miner named Percy Richmond. Because the Joint Submission of Assignments filed on June 16, 2000 purportedly resolved all issues of disputed fact, this Memorandum Opinion does not address the liability for premiums for Mr. Richmond. If the parties believe that this issue persists, they are to file appropriate pleadings within ten days of the entry of this Memorandum Opinion and accompanying Order.

A. The Takings Claim

Though the holding in *Eastern Enterprises* was splintered, it is clear that majority of the Court believed that the Coal Act, and its assessment of premiums, did not constitute a taking within the ambit of the Fifth Amendment. *See Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir.1999), *cert. denied* 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000). "[F]ive Justices rejected the conclusion that an unconstitutional taking was effected, reasoning that the constitutionality of the financial burden on the company imposed by the Coal Act must be considered as a question of substantive due process rather than as a takings question because no identifiable property interest was infringed by the legislation." *Id.See also Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir.1999) ("we are bound to follow the five-four vote against the takings claim in *Eastern* ..."), *cert. denied* 528 U.S. 963, 120 S.Ct. 396, 145 L.Ed.2d 309 (1999); *Holland v. Pardee Coal Co., Inc.*, 93 F.Supp.2d 706 (W.D.Va.2000) ("In *Eastern Enterprises*, ... five justices unequivocally stated that constitutional challenges to the funding provisions of the Coal Act must be analyzed under the Due Process Clause and its principles of fundamental fairness ... Thus, the court will not consider the Defendants' takings claim."); *United States v. Dico, Inc.*, 189 F.R.D. 536, 543 (S.D.Iowa 1999) ("In short, the only rationale embraced by at least five judges in *Eastern Enterprises* is that retroactive application of the Coal Act to Eastern did not violate the Takings Clause.").

Because the decision in *Eastern Enterprises* clearly rejects the same takings argument which the Plaintiffs present here, the Plaintiffs' motion for summary judgment on Count II of the Complaint (the takings claim) is denied and summary judgment is granted in favor of the Commissioner on Count II.

B. The Due Process Claim

The only other argument offered to support the Plaintiffs' constitutional attack is that they are identically situated to the petitioner in *Eastern Enterprises* and that, therefore, the assessment of premiums against them here is unconstitutional for the same reason it was unconstitutional in *Eastern Enterprises*. At the outset, it is necessary to analyze and understand the effect of the fractured *Eastern Enterprises* decision before determining that decision's impact on the Plaintiffs' constitutional claims.

The assessment begins with an understanding of the principle that: "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) (internal citations omitted). However, there may "not always be such a common denominator in the Court's reasoning. In some splintered decisions, there will be three or more distinct approaches, none of which is a subset of another; instead, each approach is simply different." *Rappa v. New Castle County*, 18 F.3d 1043, 1058 (3d Cir.1994) (citing *King v. Palmer*, 950 F.2d 771, 782-83 (D.C.Cir.1991)). Such is the case with *Eastern Enterprises* because no single approach received a majority of the votes from the Court. *See Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254 (D.C.Cir.1998) ("We have previously held that the rule of *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), under which the opinion of the Justices concurring in the judgment on the 'narrowest grounds' is to be regarded as the Court's holding, does not apply unless the narrowest opinion represents a 'common denominator of the Court's reasoning' and 'embod[ies] a position implicitly approved

by at least five Justices who support the judgment.' "). *See also Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161, 170 (3rd Cir.1999), ("in cases where the approaches differ, no particular standard is binding on an inferior court because none has received the support of a majority of the Supreme Court"), *cert. denied sub nom., Anker Energy Corp. v. United Mine Workers of America Combined Benefit Fund*, 528 U.S. 1003, 120 S.Ct. 496, 145 L.Ed.2d 383 (1999).

Those courts considering the scope of the splintered decision in *Eastern Enterprises* unanimously have concluded that "*Eastern* ... mandates judgment for the plaintiffs only if they stand in a *substantially identical* position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." *Unity*, 178 F.3d at 659 (emphasis added). *See Anker*, 177 F.3d at 170 ("*Eastern Enterprises* requires a finding that the Coal Act is unconstitutional as applied to Anker, then, only if Anker 'stand[s] in a substantially identical position to Eastern Enterprises with respect to both the plurality and Justice Kennedy's concurrence." ') (citing *Unity*, 178 F.3d at 659); *Association of Bituminous Contractors*, 156 F.3d at 1255 ("In short, the government is correct in stating that the only binding aspect of *Eastern Enterprises* is its specific result--holding the Coal Act unconstitutional as applied to Eastern Enterprises."); *Berwind Corp. v. Apfel*, 94 F.Supp.2d 597, 606 (E.D.Pa.2000) (same). Moreover, the parties, here, agree that the reach of *Eastern Enterprises* is limited to cases that present facts which are substantially identical to those present in *Eastern Enterprises*.

1. The Plaintiffs Are Not Substantially Identical to the Petitioner in *Eastern Enterprises*

Although there are some similarities between the Plaintiffs and Eastern, the bases for imposing liability on the respective companies under the Coal Act are sufficiently

different so as to preclude a finding that the Plaintiffs and Eastern are substantially identical. In *Eastern Enterprises,* the Commissioner of the SSA assigned to Eastern the responsibility for paying health benefit for miners it had employed before 1966. *Eastern Enterprises,* 524 U.S. at 517, 118 S.Ct. 2131. The Commissioner made this assignment, under 26 U.S.C. § 9706(a), based on Eastern's status as the pre-1978 signatory for whom the miner had worked for the longest period of time. *Id.* Eastern had not signed the "watershed" 1974 and 1978 NBCWAs, though its one- time subsidiary EACC did sign every NBCWA executed after 1965. *Id.* at 566, 118 S.Ct. 2131 (Breyer, J. dissenting). Eastern "ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the Benefit Plans under the 1974, 1978, or subsequent NBCWA's." *Id.* at 530, 118 S.Ct. 2131. Therefore, on the date specified for determining "related person" status (July 20, 1992), Eastern was not a "related person" to a signatory of the 1974 or subsequent NBCWA.

Here, as in *Eastern Enterprises,* the Commissioner assigned to the Plaintiffs the obligation to contribute to the Combined Fund, even though none of the Plaintiffs were signatories to the "watershed" 1974 or subsequent NBCWA's. However, unlike the situation presented in *Eastern Enterprises,* the Commissioner here based the assignments on the status of the Plaintiff companies as "related persons" to a 1974 or subsequent wage agreement signatory. It is undisputed that the Plaintiffs are related to numerous A.T. Massey subsidiaries who signed the 1974 or later NCBWA's.[12] Nevertheless, despite the differing theories of

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12 As a point of clarification, the Plaintiffs here do not contest the portion of the Coal Act that imposes joint and several liability upon the companies for the assignment of beneficiaries that worked for a "related person" *who was a signatory* to the 1974 or later NBCWA. Instead, the Plaintiffs contend that the Commissioner cannot, through the "related person" clause, assess liability for premiums for beneficiaries that worked for a pre-1974 signatory (or non-signatory).

liability for the beneficiaries, the Plaintiffs insist that they are substantially identically situated to Eastern and that Eastern's sale of its subsidiary EACC in 1987 should have no impact upon the analysis. This argument is unpersuasive.

Eastern Enterprises did not, in any fashion, address the constitutionality of the liability of "related persons" under the Coal Act. Indeed, the plurality specifically noted that "[a]lthough EACC continued mining coal until 1987 as a subsidiary of Eastern, *Eastern's liability under the Act bears no relationship to its ownership of EACC;* the Act assigns Eastern responsibility for benefits relating to miners that Eastern itself, not EACC, employed, while EACC would be assigned the responsibility for any miners that it had employed." *Eastern Enterprises,* 524 U.S. at 530, 118 S.Ct. 2131.

In addition to this express disclaimer in the plurality opinion, the Plaintiffs' argument also runs afoul of the Fourth Circuit's conclusion in *Big River,* 181 F.3d 597, where the Court of Appeals made clear that *Eastern Enterprises* has no bearing on "related person" (*i.e.* control group) liability: "*Eastern Enterprises did not address* whether the Coal Act violated the due process rights of members of a control group of signatories to NBCWAs promising lifetime health benefits for retired miners." *Id.,* at 606 (emphasis added). Instead, the opinion could "*only* be viewed as rendering a decision that Congress acted arbitrarily in imposing retroactive liability on a signatory to NBCWAs in existence prior to those that promised lifetime health benefits to retired miners when that signatory made no promise of lifetime benefits, did not contribute to the problem that caused the funding shortfall for the promised lifetime benefits or to the need for such benefits, and was not put on notice by any governmental action during the relevant time period that it might be subjected to later liability." *Id.* (emphasis added and internal citations omitted). Thus, the Fourth Circuit, addressing a situation similar to the control group of related Plaintiff companies here, concluded:

> *The position of members of a control group upon whom liability is imposed only by virtue of that association is different from that of the NBCWA signatory in Eastern Enterprises.* And, the considerations bearing upon whether Congress acted rationally in imposing retroactive liability on the NBCWA signatory in Eastern Enterprises are different than those relating to the rationality of imposing liability on members of a control group of a 1978 or subsequent benefit plan signatory, although admittedly some of the same arguments can be made with respect to both issues.

Id. (emphasis added).[13]

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[13] The Plaintiffs try to shoehorn a "related person" liability analysis into the plurality's holding *Eastern Enterprises* by relying upon various arguments made by the dissent in *Eastern Enterprises* indicating that Eastern's connection to EACC should be sufficient to support liability under the Act. *See , 118 S.Ct. 2131Eastern Enterprises,* 524 U.S. at 565, 118 S.Ct. 2131 (Breyer, J., dissenting) ("Eastern effectively ran EACC, sharing officers, supervising management, and receiving 100% of EACC's approximately $100 million in dividends."); *id.* at 566, 118 S.Ct. 2131 ("Eastern officials, in their role as EACC directors, ratified the post-1965 bargaining agreements ... and must have been aware of the [benefit fund's] deepening financial crisis.") Thus, the Plaintiffs contend that "[t]he Court had a related person situation squarely in its sights, and the plurality necessarily considered the relevance of that relationship before it voided Eastern's assignments." Plaintiffs' Reply Brief at 7.

This attempt to cobble together a fact-specific constitutional holding from the splintered decision in *Eastern Enterprises* is unsuccessful. As an initial matter, the Plaintiffs' contention that the plurality *Eastern Enterprises* necessarily decided the constitutionality of "related person" liability flatly contradicts the Fourth Circuit's holding to the contrary in *Big River,* a decision which is controlling here.

Secondly, it would be jurisprudential error to infer conclusions and assumptions (which were unstated) by the plurality by dissecting the views of the dissent. As explained above, when a Supreme Court decision is as fractured as *Eastern Enterprises,* the decision leaves almost no precedential guidance to lower courts. Whatever the holding of *Eastern Enterprises* may be, a district court must reject invitations to expand that holding by inferring unspecified "necessarily considered" conclusions.

In response, the Plaintiffs argue this case is factually distinct from the situation considered in *Big River* and the other cases upon which the Defendants rely, such as *Unity*, 178 F.3d 649, and *Anker*, 177 F.3d 161. To the extent that these cases may have factual distinctions, these distinctions are irrelevant to the issue presented here, namely whether the Plaintiffs are substantially identical to Eastern.

2. *Big River*

In *Big River*, the district court entered a judgment requiring the defendant companies to pay premiums for 11 retired miners. *See* 181 F.3d at 600. Because the district court's decision was made before the Supreme Court decided *Eastern Enterprises*, two of the defendant companies filed a motion for reconsideration in light of that decision because those companies "never employed the covered miners and were not within the control group when the miners were employed." 181 F.3d at 600, 604. The district court held that the defendants had waived their constitutional challenge to the Coal Act. *Id.* at 600. In affirming the district court, the Fourth Circuit noted the defendants were not signatories to a wage agreement providing lifetime benefits to miners, however they were members of a control group of a signatory company. *Id.* at 604.

As argued by the Plaintiffs here, the facts of *Big River* are somewhat distinct from the Plaintiffs' situation because the Commissioner in *Big River* did not attempt to hold the defendant companies liable for providing health benefits to their *own* former employees. Nevertheless, the ultimate holding of *Big River* did not hinge upon this factor. Instead, as explained above, *Big River* stands for the proposition that, whatever the basis for the unconstitutionality of the Coal Act as applied in *Eastern Enterprises*, the decision did not address control group or related person liability. *See Big*

River, 181 F.3d at 606. Thus, the decision in *Big River* is not amenable to the distinction which the Plaintiffs attempt to ascribe to it.

3. *Anker*

In *Anker*, the plaintiff Anker Energy Corp. ("Anker") contested the assignment of liability to pay premiums for miners employed King Knob Coal Co., Inc. ("King Knob"), a related company to Anker. *Anker*, 177 F.3d at 166. It was undisputed that King Knob signed wage agreements promising lifetime benefits to miners and that Anker was a related company to King Knob. *Id.* at 166-67.

The Third Circuit rejected the plaintiffs' argument that they were substantially identical to Eastern. *Id.* at 172. The *Anker* court read *Eastern Enterprises* to mean "that a majority of the Court would find the Act unconstitutional when applied to an employer that did not agree to the 1974 or subsequent NBCWAs, while application of the Act to a signatory to the 1974 or a subsequent wage agreement would be an entirely different matter." *Id.*

Though both Anker and King Knob were the petitioners in *Anker*, the Third Circuit explained that "[a]s a matter of convenience we usually refer to Anker alone as the plaintiff and appellant." *Id.* at 167. The court then went on to explain that "[w]e believe the fact that Anker was a signatory to [wage agreements] from the 1970s until 1984 factually distinguishes Anker's situation from that of Eastern Enterprises and compels a finding that the Act is constitutional in this instance." *Id.* at 172. Therefore, Anker's and King Knob's claims "[fell] outside the specific holding of *Eastern Enterprises*," and the application of the Coal was constitutional. *Id.*

It appears that the assignment of beneficiaries in *Anker* focused only upon the liability of Anker as a "related person" to King Knob, the employer of the retired miners and a signatory to wage agreements in the 1970's and 1980's. In the present action, the Plaintiffs are at great pains to point out that they were assessed liability not for miners that worked for "related" post-1974 signatories, but instead were held liable for their *own* employees and employees of other related companies that did not sign the 1974 or subsequent NBCWAs. This effort to distinguish *Anker* is unpersuasive because the *Anker* court focused not on the source the liability, but rather the rationale for imposing that liability. Unlike the situation in *Eastern Enterprises,* Anker was a "related person" to a company that had signed the pivotal 1970s wage agreements. Agreeing with the reasoning of the United States Court of Appeals for the District of Columbia, the *Anker* court stated, "The clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary)." *Id.* at 172 (quoting *Association of Bituminous Contractors,* 156 F.3d at 1257). Thus, the fact that the assigned beneficiaries may not have been employed by the "related person" companies who signed the relevant wage agreements is insufficient to escape the reach of *Anker* (or place the Plaintiffs within the ambit of *Eastern Enterprises*) because *Anker* emphasizes that it is the *association* with a signatory related company that supports the imposition of liability for health benefits. *See id.* at 172 (" 'the crucial fact upon which the *Eastern Enterprises* plurality and Justice Kennedy relied in concluding that Eastern's Coal Act liability was disproportionate to its past conduct and thus unfairly retroactive-namely Eastern's departure from the coal industry in 1965-is absent in this case" ') (quoting *Association of Bituminous Contractors,* 156 F.3d at 1256).

4. *Unity*

Perhaps the most factually analogous case, and the most detrimental to the Plaintiffs' argument, is the Third Circuit's decision in *Unity*. Because the intricate factual details of *Unity* are not set forth with detail in the Court of Appeals' opinion, it is helpful to turn to the underlying district court proceedings to fully understand the background of the case. *See generally Real Estate Co. v. Hudson*, 977 F.Supp. 717, 718 (W.D.Penn.1997) (district court summary judgment opinion); *Unity Real Estate v. Hudson*, 889 F.Supp. 818, 821 (W.D.Penn.1995) (district court preliminary injunction opinion).

The Plaintiff Unity Real Estate Co. ("Unity") was a corporation held by the members of the Jamison family, owned only a commercial building and a parking lot. *Unity* 178 F.3d at 654-55. Unity, however, had been assigned premiums under the Coal Act as a "related person" to several coal mining companies, which were also formed by members of the Jamison family: South Union-PA, South Union-WVA and Stewart Coal and Coke Co. *Id.* at 655. South Union-PA mined Coal from 1923 to 1961 and signed the 1947 NCBWA. *Id.See also Unity Real Estate Co. v. Hudson*, 977 F.Supp. 717, 718 (W.D.Penn.1997) (district court summary judgment opinion) ("In 1961, South Union [PA] closed down and remained idle until its merger with Unity in 1969."). South Union-WVA was incorporated in 1974 as a wholly-owned subsidiary of Unity and operated the coal mine formerly run by South Union-PA from 1975 to 1981. *Unity*, 977 F.Supp. at 719 (district court summary judgment opinion). South Union-WVA signed the 1974, 1978 and 1981 NBCWAs.[14] *Unity*, 178 F.3d at 655. Lastly, Stewart Coal & Coke Co. ("Stewart") was incorporated by the Jamison family in 1949 and operated a coal mine and coke

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[14] A bankruptcy court ultimately allowed it to renounce its obligations under the 1981 agreement. *Id.*

manufacturing plaint until the late 1950s. *Unity*, 977 F.Supp. at 719 (district court summary judgment opinion). Stewart made payments into the UMWA benefit funds from 1949 to 1958. *Id.* Other related companies in the Jamison corporate family signed NBCWAs at various times from the 1960s through the 1970s. *Unity*, 178 F.3d at 655.

The Commissioner assigned beneficiaries to Unity "on the basis that the beneficiaries, or their deceased parents or spouses in the case of survivor beneficiaries had last worked for South Union (Pennsylvania) or South Union (West Virginia) pursuant to a NBCWA." *Unity Real Estate v. Hudson*, 889 F.Supp. 818, 821 (W.D.Penn.1995) (district court preliminary injunction opinion). Thus, the Commissioner assigned liability based on the miners' employment with South Union-WVA, a related company who signed a post-1974 wage agreement, *and* employment with South Union-PA, a related company who *had not* signed the pivotal 1974 and subsequent NBCWAs. On appeal, it appears that Unity did not differentiate its challenge to the assignment of beneficiaries on the basis that some of the miners had been employed by post-1974 signatories while others were employed by companies who had not signed the "watershed" agreements.[15] *See Unity*, 178 F.3d at 655 ("The

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15 The Plaintiffs here have submitted the affidavit of David L. Laurent in an attempt to escape the direct applicability of *Unity*. Mr. Laurent, counsel for Unity in that action, explains that Unity did not challenge the constitutionality of the assignments for beneficiaries who had worked only for South Union-PA (the pre-1974 signatory) because Unity had limited financial resources. From this, the Plaintiffs extrapolate that, "because of the particular procedural posture of [*Unity*], the Third Circuit was not presented and never decided the issue of whether the assignment to Unity of beneficiaries that worked only for a pre-1974 signatory could be deemed constitutional based solely on the fact that one of Unity's other related persons (South Union WVA) had signed a 1974 NBCWA." Plaintiffs' Reply Brief for Summary Judgment and Brief in Opposition to Defendants' Motion for Summary Judgment at 21. This affidavit does not change the procedural posture of *Unity*. While the petitioners in that case may not have made the arguments presently

assignment was based upon Unity's prior employment of 63 miners, who had worked for Unity and its related companies, on average, for ten years").

Even though the Third Circuit was not faced with the precise arguments made here, the finding in *Unity* that the parent company could be held liable to pay premiums for miners that worked both for pre- and post-1974 related companies makes *Unity* especially helpful here, both factually and analytically. Thus, *Unity* 's conclusion is persuasive authority.

In *Unity,* the Third Circuit found that "[b]ecause the plaintiffs signed NBCWAs in 1974 and thereafter, *they are factually distinguishable* from Eastern Enterprises." *Unity* 178 F.3d at 659. The parent company Unity never signed a coal wage agreement, therefore the Court's reference to the

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(...continued)
pressed by the Plaintiffs, the Third Circuit nevertheless found that the assignment of beneficiaries--*all* beneficiaries was a constitutional application of the Coal Act and that Unity was not in a substantially identical situation to Eastern. Though the recitation of facts in the appellate *Unity* decision may not make the distinction crystal clear, this Court is quite reticent to assume that the Third Circuit did not understand the factual background of the controversy before it. Indeed, the lack of distinction between the pre- and post-1974 signatory related companies could arguably support the idea that the Third Circuit simply perceived no difference between the two.

Additionally, the Trustees highlight another difficulty with attributing any significance to Mr. Laurent's affidavitit is simply incorrect. Out of the 63 retired coal miners who were assigned to Unity, only 10 ever worked for South Union-WVA, the only post-1974 signatory employer at issue. *See* Trustee's Reply Memorandum in Support of Summary Judgment (citing to and attaching Unity Real Estate Company's Responses to Defendants' First Request for Admissions at Nos. 28, 34-96). Thus, if Unity truly sought to efficiently limit its liability, it would have made this argument as well because that would have significantly limited its exposure. The simple truth, however, is that the Third Circuit considered the challenge as presented that is, whether or not Unity could be assessed liability for health benefits for miners who worked for related companies who were both pre- and post-1974 signatories to NCBWAs.

participation in the 1974 and later NBCWAs must necessarily refer to the fact that South Union-WVA, a related company to Unity, signed the agreement. This single company's participation in the "watershed" wage agreements was sufficient to impose liability for health benefits for miners who had worked for all the companies, not just those employed by the signatory company.

Like other courts considering the matter, the *Unity* court explained that "[l]anguage in the plurality and the concurrence suggesting that expectations fundamentally changed after 1974 supports our conclusion." *Id.* Moreover, the fact that *Eastern Enterprises* did not address related company liability buttressed the court's conclusion: "Although we recognize that the [*Eastern Enterprises*] Court was not presented with argument focused on post-1978 signatories and thus may not have had before it all the available evidence about later contracts, *that very distinction compels the conclusion that Eastern is not on all fours with the case before us.*" *Id.* (emphasis added).

5. Conclusion

As *Big River, Anker* and *Unity* demonstrate, a company that is assigned liability for premiums under the Coal Act based on its status as a "related person" to a 1974 or subsequent NBCWA signatory is not substantially identical to Eastern because *Eastern Enterprises* did not addresses related person liability. Instead, it merely held that the assignment of the obligation to pay premiums to a company that did not promise lifetime health benefits, and who was not a "related person" to a company that made such a promise, was unfairly retroactive and, therefore, unconstitutional.

While the thorny issue of beneficiary assignments under the Coal Act may have other statutory fallacies,[16] those arguments are not raised here by the Plaintiffs. Significantly, the Plaintiffs failed to articulate any due process violation other than its substantial identity to the facts of *Eastern Enterprises*.[17] The Plaintiffs have failed to explain why, if the Court were to find them not substantially identical to Eastern, the application of the Coal Act could nevertheless work a violation of due process. It would be inappropriate to entertain other possible, but ill-defined, due process argument because "[c]ourts do not adjudicate generalized claims of unconstitutionality, but rather resolve constitutional questions by applying these settled doctrines to specific constitutional claims asserted

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[16] Of particular note is *Berwind Corp. v. Apfel*, 94 F.Supp.2d 597 (E.D.Pa.2000), where the plaintiff company made the same arguments pressed here (*i.e.*, that the Commissioner could not constitutionally assign to a company liability to pay premiums for its *own* retired miners when that company did not sign the relevant NBCWAs) and the district court held that the application was unconstitutional under *Eastern Enterprises*. That decision, however, was directed more to what the district court believed was an erroneous application of the Coal Act than the similarity of the Plaintiffs to Eastern.

To the extent that *Berwind* may have relevance here, the Court finds more persuasive the decision in *Shenango, Inc. v. Apfel*, Civil Action No. 99- 1035 (W.D.Pa. July 25, 2000), in which the district court concluded that the plaintiffs were not substantially identically situated to Eastern, despite the fact that the companies for whom the beneficiaries had worked had never signed the 1974 or subsequent NBCWAs. Both *Shenango* and *Berwind* are currently on appeal to the Third Circuit.

[17] Indeed, during argument on this motion, the Plaintiffs were quite pointedly asked to identify and articulate any other due process argument. They could not. Even though the Defendants' pleadings should have put the Plaintiffs on notice that their due process argument was quite narrow, *see* Trustees' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment at 14 ("The Massey Plaintiff's sole argument in support of their motion for summary judgment is that they are identically situated to the petitioner in *Eastern* "), the Plaintiffs simply ignored this warning and proceeded with a single focus on aligning itself to *Eastern Enterprises*.

under specific constitutional clauses." *Association of Bituminous Contractors*, 156 F.3d at 1253. Therefore, unlike the arguments made, and decisions reached, in *Unity* and *Anker*, it is unnecessary to address the any remaining due process considerations. *See Unity*, 178 F.3d at 659 ("To the extent that *Eastern* embodies principles capable of broader application, we believe that due process analysis encompasses the relevant concerns... and we believe that the relevant measurement is the extent of the gap between the coal companies' contractual promises to the Funds and the requirements of the Coal Act."); *Anker*, 177 F.3d at 172-73 ("our opinion in *Unity Real Estate* directs us to apply an additional level of due process analysis designed to measure 'the extent of the gap between the coal companies' contractual promises to the Funds and the requirements of the Coal Act." '). *See also Association of Bituminous Contractors*, 156 F.3d at 1255 (because the plaintiffs were not substantially identical to Eastern "our basic inquiry in resolving appellant's due process challenge remains the same ...").

Because the Plaintiffs fail on their sole due process argument, the Plaintiffs' motion for summary judgment is denied and summary judgment is granted in favor of the Defendant Commissioner on Count I.

III. The Commissioner's Assignment of Beneficiaries to the Plaintiffs

The Commissioner's decision to assign beneficiaries to the Plaintiffs must be set aside if the Court finds that his action was either "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). The Plaintiffs assert that the SSA Commissioner's action was not in accordance with law because it is contrary to both the

Supreme Court's decision in *Eastern Enterprises* and the Plaintiffs' constitutional rights. Having found above that the assessment of premiums to the Plaintiffs under the Coal Act is not in contravention of the Supreme Court's holding in *Eastern Enterprises,* the SSA Commissioner's decision must stand as it is neither arbitrary nor capricious, and otherwise is in accordance with law. Therefore, the Plaintiffs' motion for summary judgment on Count III is denied and summary judgment is granted in favor of the Defendant Commissioner on that count.

IV. Return of Plaintiffs' Premiums Already Paid

Having found that the premiums were constitutionally assessed against the Plaintiffs under the provisions of the Coal Act, the Court also finds that the Plaintiffs are not entitled to have the Combined Fund return those premiums paid to the Fund. Therefore, the Plaintiffs' motion for summary judgment is denied on Counts IV and VI. [18]

V. The Trustee's Counterclaims

In their motion for summary judgment, the Trustees make the bare assertion that summary judgment is appropriate for their counterclaims as well. However, the Trustees provide no argument or decisional support as to why that may be appropriate. The Trustees presented no argument or evidence supporting their claim for damages incurred as a result of the Plaintiffs' refusal to pay premiums, nor have they supported their claim for injunctive relief to require the Plaintiffs to pay the premiums and to prevent the

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[18] Although the Defendant Trustees moved for summary judgment on their counterclaim, the Trustees did not seek summary judgment as to the Plaintiffs' claims. Nevertheless, resolution of the Plaintiffs' motion for summary judgment and the Commissioner's motion for summary judgment essentially resolves all issues in this action, thereby rendering the claims directed against the Trustees moot.

Plaintiffs from improperly disposing of corporate assets. Therefore, the motion for summary judgment on those counterclaims (Counts II and III) is denied.

As to the Trustee's request for a declaratory judgment that the Coal Act is constitutional as applied to the Plaintiffs, that request has been mooted by the disposition of the Plaintiffs' claims. *See United Public Workers of Am. v. Mitchell*, 330 U.S. 75, 89, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947) ("For adjudication of constitutional issues concrete legal issues, presented in actual cases, not abstractions are requisite. This is as true of declaratory judgments as any other field.") (internal quotations omitted). To determine whether a declaratory judgment requests presents a justiciable controversy, the court must consider "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941). Here, there is no longer a substantial controversy, and, to the extent that there is a controversy, it is not sufficiently immediate or real to warrant adjudication of a constitutional claim. Therefore, upon the resolution of the Plaintiffs' claims, the request for declaratory judgment by the Trustees is denied as moot.

CONCLUSION

For the foregoing reasons, the Plaintiffs' Motion for Summary Judgment is denied and the Defendant Commissioner's Motion for Summary Judgment is granted. The Trustees' Motion for Summary Judgment on their Counterclaims is denied.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 3:99cv83

A.T. MASSEY COAL COMPANY, INC., *et al.*
Plaintiffs,

v.

LARRY G.MASSANARI,
Acting Commissioner of Social Security, *et al.*,
Defendants.

UNITED MINE WORKERS OF AMERICA
COMBINED BENEFIT FUND, *et al.*,
Counterclaim Plaintiffs,

vs.

A.T. MASSEY COAL COMPANY, INC., *et al.*,
Counterclaim Defendants.

[Entered: August 27, 2001]

ORDER

Upon consideration of the Joint Motion for Order Amending Judgment, the Stipulation of the parties and agreement of counsel, and for good cause shown, it is hereby ORDERED that:

(1) the Joint Motion for an Order Amending Judgment be, and hereby is GRANTED;

(2) the Stipulation entered into among and between the Plaintiffs/Counterclaim Defendants, the Counterclaim Defendants, and the Defendants/Counterclaim Plaintiffs is hereby incorporated by reference;

(3) the Plaintiff/Counterclaim Defendants and Counterclaim Defendants will pay the Defendant/Counterclaim Plaintiffs the relief that is set forth in the parties' Stipulation, in the amount and in the manner agreed to by the parties;

(4) the Court's Judgment and Order of July 29, 2001 be amended in accordance with the terms of the parties' Stipulation; and

(5) in accordance with the parties' Stipulation, and in light of the entry of this Order, the Defendant/Counterclaim Plaintiffs' Motion to Alter or Amend Judgment dated August 2, 2001 shall be deemed withdrawn.

The Clerk is directed to send a copy of this Order to all counsel of record and to close the case.

It is so ORDERED.

\s\ Robert E. Payne
United States District Judge

Richmond, Virginia
Date: August 27, 2001

U.S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. § 706.

Section 706 provides, in pertinent part, that a reviewing court shall:

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or]
> >
> > (B) contrary to constitutional right, power, privilege, or immunity . . . .

26 U.S.C. § 9701(c)(2)

(A) In general.–A person shall be considered to be a related person to a signatory operator if that person is–

(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii) or (iii).

(B) Time for determination.–The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992, except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

26 U.S.C. § 9704(a)

Section 9704(a) provides, in pertinent part:

> Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

26 U.S.C. § 9706(a)

(a) **In general.**-- For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which –

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which –

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

26 U.S.C. § 9706(b)

Section 9706(b) provides, in pertinent part:

> **(b) Rules relating to employment and reassignment upon purchase.**–For purposes of subsection (a)–
>
> **(1) Aggregation rules.–**
>
> **(A) Related person.–** Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.